MOUNTAINVIEW HOSPITAL, INC.; JASON E. GARBER, M.D.; AND JASON E. GARBER, M.D., LTD., PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE STEFANY MILEY, DISTRICT JUDGE, RESPONDENTS, AND LAURA REHFELDT; AND EDWARD REHFELDT, REAL PARTIES IN INTEREST.

No. 57502

April 5, 2012 273 P.3d 861

Petition for writ of mandamus or prohibition challenging the district court's denial of a motion to dismiss a medical malpractice action.

After hospital's and doctor's motion to dismiss injured patient's medical malpractice action based on failure to satisfy medical malpractice affidavit requirement was denied, hospital and doctor petitioned for writ of mandamus or prohibition requiring dismissal of action. The supreme court, HARDESTY, J., held that: (1) as a matter of first impression, if a litigant contests a medical expert's written statements accompanying a medical malpractice complaint based on the validity or lack of a jurat, the plaintiff may show by other evidence that the expert's statements were made under oath or constitute an unsworn declaration made under penalty of perjury, and (2) medical expert's opinion letter in itself did not satisfy medical malpractice affidavit requirement.

Petition granted in part.

Hall Prangle & Schoonveld, LLC, and *John F. Bemis, Kenneth M. Webster*, and *Michael T. Koptik*, Las Vegas, for Petitioner MountainView Hospital, Inc.

Lewis Brisbois Bisgaard & Smith, LLP, and *Keith A. Weaver* and *Michael J. Shannon*, Las Vegas, for Petitioners Jason E. Garber, M.D.; and Jason E. Garber, M.D., Ltd.

Roger P. Croteau & Associates, Ltd., and *Roger P. Croteau* and *Timothy E. Rhoda*, Las Vegas, for Real Parties in Interest.

1. MOTIONS.

   Dispositional court orders that are not administrative in nature, but deal with the procedural posture or merits of the underlying controversy, must be written, signed, and filed before they become effective.

2. MANDAMUS.

   Injured patient's failure to timely file answer to hospital's and doctors' mandamus petition regarding medical malpractice action was not confession of error by injured patient, where answer was filed only three days after the supreme court's extended filing deadline and hospital and doctor did not allege or demonstrate any prejudice resulting from delay.

3. MANDAMUS.
   The supreme court would not consider hospital's and doctor's request to strike injured patient's answer to hospital's and doctor's mandamus petition regarding medical malpractice action, when hospital and doctor did not file appropriate motion for such request and provide patient with opportunity to respond. NRAP 27.
4. MANDAMUS; PROHIBITION.
   Whether extraordinary writ relief will issue is solely within the supreme court's discretion.
5. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion. NRS 34.160.
6. PROHIBITION.
   A writ of prohibition is available when a district court acts without or in excess of its jurisdiction. NRS 34.320.
7. COURTS.
   Consideration of extraordinary writ relief is often justified when an important issue of law needs clarification and public policy is served by the supreme court's invocation of its original jurisdiction.
8. MANDAMUS.
   The supreme court will normally not entertain writ petition challenging denial of a motion to dismiss but may do so when the issue is not fact-bound and involves an unsettled, and potentially significant, recurring question of law.
9. HEALTH.
   Affidavit requirement in medical malpractice action can be met either by sworn affidavit or unsworn declaration made under penalty of perjury. NRS 41A.071, 53.045.
10. AFFIDAVITS.
    An ''affidavit'' is a written statement sworn to by the declarant before an officer authorized to administer oaths.
11. HEALTH.
    If a litigant contests a medical expert's written statements accompanying a medical malpractice complaint based on the validity or lack of a jurat, the plaintiff may show by other evidence that the expert's statements were made under oath or constitute an unsworn declaration made under penalty of perjury. NRS 41A.071.
12. HEALTH.
    Medical expert's opinion letter in itself did not satisfy medical malpractice affidavit requirement; letter lacked a jurat and included notary's acknowledgment only that expert had signed letter without also indicating that expert's statements were made under penalty of perjury. NRS 41A.071.

Before DOUGLAS, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

In this petition for extraordinary writ relief, we are asked to consider whether a plaintiff has complied with the affidavit require-

ment in a medical malpractice action when a medical expert's opinion letter attached to the plaintiff's complaint does not include a jurat,[1] and there is no declaration from the medical expert in either the opinion letter or a notary acknowledgment declaring that the statements contained in the opinion letter are made under penalty of perjury.

We conclude that the absence of a properly executed jurat does not render a medical expert's written statement insufficient to meet the affidavit requirement of NRS 41A.071. Because a jurat is merely evidence that the medical expert swore under oath to the veracity of his or her statement before an officer authorized to administer oaths, it is clear that other evidence that the expert's written statement was made under oath can be offered to satisfy NRS 41A.071's affidavit requirement.

FACTS AND PROCEDURAL HISTORY

Real parties in interest Laura and Edward Rehfeldt filed a complaint for medical malpractice, among other claims, alleging that Laura contracted a Methicillin-resistant Staphylococcus aureus (MRSA) and went into septic shock after undergoing elective back surgery at MountainView Hospital. Because Laura tested negative for being colonized with or a carrier for MRSA prior to the surgery, the Rehfeldts asserted that petitioners MountainView Hospital, Jason E. Garber, M.D., and Jason E. Garber, M.D., Ltd. (collectively, MountainView)[2] committed medical malpractice by failing to provide a clean and sterile hospital environment and failing to properly care for Laura.

Accompanying their complaint for medical malpractice, and at issue in this case, was an opinion letter from Dr. Bernard T. McNamara supporting the Rehfeldts' claim, with a ''California All-Purpose Acknowledgment'' form attached to the letter. Neither the opinion letter nor the acknowledgment contained any statement that Dr. McNamara swore under oath that the statements contained in his letter were true and correct, and neither the opinion letter nor the acknowledgment contained a declaration from Dr. McNamara declaring that his statements were made under penalty of perjury. The acknowledgment was prepared by a California notary public and stated as follows:

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[1]A jurat is defined as ''a declaration by a notarial officer that the signer of a document signed the document in the presence of the notarial officer and swore to or affirmed that the statements in the document are true.'' NRS 240.0035.

[2]When necessary, we will separately refer to the hospital as MountainView Hospital and to Jason E. Garber, M.D., and Jason E. Garber, M.D., Ltd., collectively as Dr. Garber.

> On 12/15/08 before me, Sandra Ferrer Notary Public, personally appeared Bernard T. McNamara, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.
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> I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

The notary public signed the acknowledgment and affixed her notary stamp; however, Dr. McNamara signed only his letter. The Rehfeldts filed an amended complaint attaching the same opinion letter from Dr. McNamara and notary acknowledgment, and included a similar letter from a nurse, Mary Wyckoff.[3]

Dr. Garber responded to the Rehfeldts' amended complaint by filing a motion to dismiss, which MountainView Hospital joined. Dr. Garber argued that NRS 41A.071 requires a supporting medical expert affidavit to be attached to a medical malpractice complaint, and that Dr. McNamara's opinion letter and the notary acknowledgment failed to satisfy that requirement. Without specifically discussing the statute's affidavit requirement, the district court entered a written order summarily denying Dr. Garber's motion to dismiss.

[Headnotes 1-3]

The case was subsequently reassigned to a different department in the district court, and MountainView Hospital filed a second motion to dismiss, reasserting Dr. Garber's argument that the Rehfeldts failed to comply with the affidavit requirement of NRS 41A.071. Dr. Garber joined in the motion. According to MountainView Hospital, the district court verbally denied its second motion at a hearing, ''alleging that [the previous judge] had already ruled that [the Rehfeldts'] letter from Dr. McNamara was the equivalent of an affidavit.'' However, a written order denying MountainView Hospital's second motion to dismiss was never filed in the district court.[4] MountainView Hospital and Dr.

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[3]As neither MountainView nor the Rehfeldts have made any arguments with regard to whether Wyckoff's letter satisfied the affidavit requirement, we refrain from addressing Wyckoff's letter any further in this opinion.

[4]Because the district court's oral order denying MountainView Hospital's motion to dismiss on the basis of NRS 41A.071's affidavit requirement deals with the procedural posture of the Rehfeldts' case, we conclude that it is ineffective and thus not subject to review by this court. ''[D]ispositional court

Garber then filed the instant petition for a writ of mandamus or prohibition.[5]

DISCUSSION

[Headnotes 4-8]

This court has original jurisdiction to issue writs of mandamus and prohibition. Nev. Const. art. 6, § 4. Whether extraordinary writ relief will issue is solely within this court's discretion. *Walters v. Dist. Ct.*, 127 Nev. 723, 727, 263 P.3d 231, 233 (2011). ''A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion.'' *We the People Nevada v. Secretary of State*, 124 Nev. 874, 879, 192 P.3d 1166, 1170 (2008); NRS 34.160. ''A writ of prohibition . . . is available when a district court acts without or in excess of its jurisdiction.'' *International Game Tech. v. Dist. Ct.*, 122 Nev. 132, 142, 127 P.3d 1088, 1096 (2006); NRS 34.320. Generally, an extraordinary writ may only be issued in cases ''where there is not a plain, speedy and adequate remedy'' at law. NRS 34.170; NRS 34.330. In addition, consideration of extraordinary writ relief is often justified '' 'where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.' '' *Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (quoting *Business Computer Rentals v. State Treas.*, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998)); *see also International Game Tech.*, 122 Nev. at 142-

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orders that are not administrative in nature, but deal with the procedural posture or merits of the underlying controversy, must be written, signed, and filed before they become effective.'' *State, Div. Child & Fam. Servs. v. Dist. Ct.*, 120 Nev. 445, 454, 92 P.3d 1239, 1245 (2004). Notwithstanding the district court's ineffective oral order on MountainView's second motion to dismiss, we hold that the issues raised in MountainView's writ petition are subject to review by this court, as the district court did enter a written order denying Dr. Garber's motion to dismiss, which MountainView Hospital joined, based on his contention that the Rehfeldts failed to comply with NRS 41A.071.

[5]MountainView also argues that the Rehfeldts' failure to timely file their answer to the petition for writ relief should be considered a confession of error. We decline to do so. This court directed the Rehfeldts to file an answer to the petition, and, pursuant to a stipulation between the parties to extend the filing deadline, this court ordered the answer filed on March 11, 2011, only 3 days after the extended filing deadline. Furthermore, MountainView fails to allege or demonstrate any prejudice resulting from the delay. *See Carson City v. Price*, 113 Nev. 409, 411 n.1, 934 P.2d 1042, 1043 n.1 (1997) (denying respondents' motion to dismiss based on appellants' one-day tardiness in filing their opening brief because ''respondents have not alleged or shown that they suffered any prejudice as a result of this delay''). Finally, MountainView's request to strike the Rehfeldts' answer does not warrant consideration as MountainView failed to file the appropriate motion before this court and provide the Rehfeldts with an opportunity to respond. *See* NRAP 27.

43, 127 P.3d at 1096 (consideration of writ relief is appropriate where ''petitions raise important issues of law in need of clarification, involving significant public policy concerns, of which this court's review would promote sound judicial economy''). However, ''[n]ormally, this court will not entertain a writ petition challenging the denial of a motion to dismiss but . . . may do so where . . . the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law.'' *Buckwalter v. Dist. Ct.*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010).

In this case, MountainView argues that the district court erred in denying the motion to dismiss after ruling that Dr. McNamara's opinion letter and the attached acknowledgment met NRS 41A.071's affidavit requirement. Because this petition for extraordinary writ relief presents an issue of first impression in Nevada and involves an unsettled and potentially significant, recurring question of law concerning the satisfaction of NRS 41A.071's affidavit requirement for a medical malpractice cause of action, we exercise our discretion to consider MountainView's petition for writ of mandamus.

NRS 41A.071's affidavit requirement

[Headnote 9]

NRS 41A.071 states that medical malpractice actions filed without an accompanying affidavit supporting the allegations must be dismissed:

> [i]f an action for medical malpractice . . . is filed in the district court, *the district court shall dismiss the action*, without prejudice, *if the action is filed without an affidavit*, supporting the allegations contained in the action, submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice.

(Emphases added.) ''NRS 41A.071 imposes an affidavit requirement, which NRS 53.045 permits a litigant to meet either by sworn affidavit or unsworn declaration made under penalty of perjury.'' *Buckwalter*, 126 Nev. at 202, 234 P.3d at 922.

[Headnote 10]

''An affidavit is a written statement 'sworn to by the declarant before an officer authorized to administer oaths.' '' *Id.* at 202, 234 P.3d at 921 (quoting *Black's Law Dictionary* 66 (9th ed. 2009)). To prove that an affidavit was made under oath, it typically includes a jurat. *See Lutz v. Kinney*, 23 Nev. 279, 282, 46 P. 257, 258 (1896) (''[T]he 'jurat[ ]' is essential, not as a part of the affidavit, but as official evidence that the oath was taken before the proper officer.''). Alternatively, an unsworn declaration made under

penalty of perjury is a written statement included in a document declaring the existence or truth of a matter, which is ''signed by the declarant under penalty of perjury, and dated, in substantially the following form: . . . 'I declare under penalty of perjury that the foregoing is true and correct.' '' NRS 53.045(1).

[Headnote 11]

Here, Dr. McNamara's opinion letter and accompanying notary acknowledgment lack the traditional jurat. Whether an expert's written statements satisfy NRS 41A.071's affidavit requirement in the absence of a properly executed jurat is a matter of first impression in Nevada. Other jurisdictions have concluded that the problems raised by an absent or defective jurat can be overcome by other evidence. In *American Home Life Insurance Company v. Heide*, the Supreme Court of Kansas held that '' '[t]he jurat is merely evidence that an oath was duly administered, and in the absence of a jurat the fact may be proved by evidence *aliunde*,' ''[6] and ''[t]he absence of a jurat on the affidavit did not invalidate the service on appellant.'' 433 P.2d 454, 458 (Kan. 1967) (quoting *James v. Logan*, 108 P. 81, 81 (Kan. 1910)). Similarly, in *King v. State*, the Court of Criminal Appeals of Texas held that ''[t]he jurat is not part of the affidavit. . . . When the jurat on its face is defective, the fact that it was properly sworn to may be shown by other evidence.'' 320 S.W.2d 677, 678 (Tex. Crim. App. 1959) (internal citation omitted). We likewise conclude that if a litigant contests a medical expert's written statements accompanying a medical malpractice complaint based on the validity or lack of a jurat, the plaintiff may show by other evidence that the expert's statements were made under oath or constitute an unsworn declaration made under penalty of perjury.

The Rehfeldts' compliance with NRS 41A.071

MountainView argues that the district court erred by denying Dr. Garber's motion to dismiss because, without a sworn affidavit or an unsworn declaration, there is no evidence that Dr. McNamara took an oath and swore to the truthfulness of his statements under penalty of perjury. In response, the Rehfeldts contend that Dr. McNamara's letter and accompanying acknowledgment constitute a sworn affidavit because ''(a) it is a written declaration made voluntarily; (b) it was confirmed by oath; and (c) it was made before a person having authority to administer such an oath.''

[Headnote 12]

NRS 240.002 defines ''[a]cknowledgment'' in part as ''a declaration by a person that he or she has executed an instrument for

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[6]Evidence *aliunde* is defined as ''[e]vidence from outside, from another source.'' *Black's Law Dictionary* 73 (6th ed. 1990).

the purposes stated therein.'' By its definition, an acknowledgment does not validate that the person executing the instrument swears or affirms that the statements in the instrument are true and correct or that the statements were made under penalty of perjury.

Only the notary public signed the acknowledgment, and she simply acknowledged that Dr. McNamara was the person who signed the letter. The acknowledgment does not contain any statement that Dr. McNamara ''swore to or affirmed that the statements in the document are true,'' NRS 240.0035; *Buckwalter*, 126 Nev. at 202, 234 P.3d at 921. Thus, based upon the record, we cannot conclude that Dr. McNamara's opinion letter constitutes an affidavit.[7] In addition, the notary acknowledgment in this case does not satisfy NRS 41A.071.

Notwithstanding the omission of a jurat, however, the Rehfeldts may be able to demonstrate compliance with NRS 41A.071's affidavit requirement through other evidence. Under our holding today, the Rehfeldts should be permitted to show that Dr. McNamara appeared before the notary public and swore under oath that the statements contained in the letter were true and correct. The Rehfeldts did submit a declaration to this court signed by Dr. McNamara in which he states that he appeared before the notary public and swore under oath that the opinions in his letter were true and correct and that he signed his letter ''under oath and under penalty of perjury.'' But this declaration was never presented to the district court for its consideration, and neither MountainView Hospital nor Dr. Garber were provided an opportunity to contest the declaration.[8]

Accordingly, we grant in part MountainView's petition for extraordinary relief and direct the clerk of this court to issue a writ of mandamus instructing the district court to conduct an evidentiary hearing for the limited purpose of determining whether the Rehfeldts can sufficiently prove that Dr. McNamara appeared before the notary public and swore under oath that the statements contained in his opinion letter were true and correct.[9] If, after conducting the evidentiary hearing, the district court concludes that

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[7]Upon review of the record, we also conclude that the Rehfeldts cannot satisfy NRS 41A.071 by unsworn declaration because neither the opinion letter nor the acknowledgment included such a declaration. *See Washoe Medical Center v. District Court*, 122 Nev. 1298, 1300, 148 P.3d 790, 792 (2006) (concluding that failure to satisfy the affidavit requirement of NRS 41A.071 results in the complaint becoming void ab initio and explaining that a void complaint cannot be amended).

[8]There is no indication in the record before us that Dr. McNamara's declaration was ever presented to the district court. *See In re AMERCO Derivative Litigation*, 127 Nev. 196, 217 n.6, 252 P.3d 681, 697 n.6 (2011) (''[W]e decline to address an issue raised for the first time on appeal.'').

[9]Based on our holding today, we deny MountainView's alternative request for a writ of prohibition.

the Rehfeldts failed to comply with NRS 41A.071's affidavit requirement, the Rehfeldts' claim for medical malpractice must be dismissed as void ab initio. *See Washoe Medical Center*, 122 Nev. at 1300, 148 P.3d at 792.

DOUGLAS and PARRAGUIRRE, JJ., concur.

MICHAEL W. JONES; AND ANALISA A. JONES, APPELLANTS, *v.* SUNTRUST MORTGAGE, INC., RESPONDENT.

No. 57748

April 26, 2012 274 P.3d 762

Appeal from a district court order denying judicial review in a foreclosure mediation matter. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Mortgagor petitioned for judicial review, alleging that mortgagee violated statute and rules governing statutory foreclosure mediation and seeking sanctions against mortgagee. The district court denied petition. Mortgagor appealed. The supreme court, GIBBONS, J., held that signed agreement between mortgagee and mortgagor resulting from participation in statutory foreclosure mediation program was enforceable and thus precluded judicial review.

Affirmed.

Terry J. Thomas, Reno, for Appellants.

Snell & Wilmer LLP and *Leon F. Mead II, Cynthia L. Alexander*, and *Kelly H. Dove*, Las Vegas, for Respondent.

1. MORTGAGES.
   When reviewing whether the parties to statutory foreclosure mediation reached an enforceable settlement agreement, the supreme court must defer to the district court's findings of fact unless they are clearly erroneous or not based on substantial evidence. NRS 107.086.
2. APPEAL AND ERROR.
   For purposes of reviewing whether a finding of fact is supported by substantial evidence, ''substantial evidence'' is evidence that a reasonable mind might accept as adequate to support a conclusion.
3. MORTGAGES.
   The supreme court reviews the district court's decision regarding the imposition of sanctions for a party's participation in statutory foreclosure mediation program under an abuse of discretion standard. NRS 107.086.
4. COMPROMISE AND SETTLEMENT.
   A settlement agreement is a contract, and thus, must be supported by consideration in order to be enforceable.

5. CONTRACTS.
   ''Consideration'' is the exchange of a promise or performance, bargained for by the parties.
6. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
   Signed agreement between mortgagee and mortgagor resulting from participation in statutory foreclosure mediation program was enforceable and thus precluded judicial review of claims that mortgagee violated statute and rules governing such mediation; agreement was in writing as required by court rule, and agreement otherwise met requirements for contractual settlement agreement. NRS 107.086; DCR 16.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

In this appeal, we consider whether a signed agreement resulting from Nevada's Foreclosure Mediation Program (FMP) constitutes an enforceable settlement agreement. We conclude that when an agreement is reached as a result of an FMP mediation, the parties sign the agreement, and it otherwise comports with contract law principles, the agreement is enforceable under District Court Rule 16.[1] Therefore, we affirm the district court's order denying the Joneses' petition for judicial review.

FACTS AND PROCEDURAL HISTORY

In 2006, appellants Michael W. Jones and Analisa A. Jones purchased a home in Sparks with a loan from Home Mortgage Direct Lenders. Home Mortgage Direct Lenders allegedly assigned the note and deed of trust to respondent SunTrust Mortgage, Inc.[2] The Joneses later defaulted on their mortgage. After receiving a notice of default and election to sell, the Joneses elected to participate in the FMP provided for in NRS 107.086.

SunTrust's attorney, the Joneses' attorney, and Mr. Jones attended the mediation in person, and a representative for SunTrust participated in the mediation by telephone. At the mediation, SunTrust produced uncertified copies of the original deed of trust, the original note, and the endorsement of the note to SunTrust.

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[1]DCR 16 states:

> No agreement or stipulation between the parties in a cause or their attorneys, in respect to proceedings therein, will be regarded unless the same shall, by consent, be entered in the minutes in the form of an order, or unless the same shall be in writing subscribed by the party against whom the same shall be alleged, or by his attorney.

[2]SunTrust did not provide copies of any assignments at the foreclosure mediation.

SunTrust also produced an automated valuation of the Joneses' home that an online company generated without an in-person inspection of the home. SunTrust did not submit copies of any assignments. Despite SunTrust's failure to produce any assignments or certified copies of the other documents, the parties resolved the pending foreclosure by agreeing to a short sale of the Joneses' home, if accomplished within a specified time period. The mediator's statement sets forth that the parties agreed to the following terms:

> 14 days from 11/12/10, borrower will return short-sale package of documents to lender, including listing agreement for sale of the property. On or after 1/16/2011, lender shall have the right to seek a certificate from the FMP to proceed with foreclosure regardless of the status of the pending short sale. Borrower shall still have the right to make a short sale up to the time of foreclosure[.]

SunTrust's attorney, the Joneses' attorney, and Mr. Jones all signed the mediator's statement agreeing to execute the terms of the short sale.[3]

Following the mediation, SunTrust twice mailed a short-sale package to the Joneses, but the Joneses never returned the short-sale documents and instead filed a petition for judicial review in the district court. The Joneses requested that the district court impose sanctions against SunTrust because SunTrust violated NRS 107.086 and the Foreclosure Mediation Rules (FMRs) by failing to provide the required documents and mediating in bad faith. After conducting a hearing on the petition, the district court denied the petition, finding that the Joneses entered into an enforceable short-sale agreement and therefore waived any claims under NRS 107.086 and the FMRs. The district court order allowed SunTrust to seek a certificate from the FMP to proceed with the foreclosure against the Joneses based on the terms of the short-sale agreement. This appeal followed.

DISCUSSION

The short-sale agreement is an enforceable settlement agreement

The Joneses argue that the short-sale agreement with SunTrust is not enforceable because the agreement lacks consideration and SunTrust failed to comply with NRS 107.086 and the FMRs.

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[3]While Ms. Jones was not present at the mediation, the Joneses do not argue that their attorney was not authorized to bind her to the agreement. To the extent that the Joneses suggest their attorney provided incompetent representation, the Joneses waived this argument by failing to raise it before the district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (''A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.'').

[Headnotes 1-3]

When reviewing whether the parties to a foreclosure mediation reached an enforceable settlement agreement, we must ''defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence.'' *May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005). ''Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.'' *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008). We review a ''district court's decision regarding the imposition of sanctions for a party's participation in the Foreclosure Mediation Program under an abuse of discretion standard.'' *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 468, 255 P.3d 1281, 1286 (2011).

[Headnotes 4, 5]

A settlement agreement is a contract, and thus, must be supported by consideration in order to be enforceable. *May*, 121 Nev. at 672, 119 P.3d at 1257. Consideration is the exchange of a promise or performance, bargained for by the parties. *Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984) (citing Restatement (Second) of Contracts § 71(1), (2) (1981)). If the settlement agreement is reduced to a writing signed by the party that it is being enforced against, or by his or her attorney, then it is enforceable under DCR 16.[4] *See Resnick v. Valente*, 97 Nev. 615, 616-17, 637 P.2d 1205, 1206 (1981) (reversing a district court's enforcement of a settlement agreement when the agreement was not reduced to a signed writing or entered in the court minutes following a stipulation).

[Headnote 6]

Substantial evidence supports the district court's finding that the mediator's statement containing the written short-sale terms, signed by all parties, including Mr. Jones and the attorney representing the Joneses, constitutes an enforceable settlement agreement. First, the short-sale agreement was supported by consideration. In exchange for the Joneses' agreement to a short sale, SunTrust agreed to suspend the foreclosure proceedings against the Joneses for two months. If the short sale was not accomplished within the two-month period, SunTrust could proceed with the foreclosure, but the Joneses maintained the right to conduct a short sale until the time of the foreclosure sale. Second, since we conclude that the district court properly found that the settlement agreement was enforceable, and the terms of the agreement allowed SunTrust to seek a certificate and pursue foreclosure if the short sale was not accomplished within a specified time, the Joneses'

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[4]If a participant in the FMP appears at a mediation by telephone, the party must provide a copy of the settlement agreement with his or her signature to the mediator in order to ensure compliance with DCR 16.

claim that the foreclosure cannot proceed based on alleged violations of NRS 107.086 and the FMRs lacks merit. The parties expressly agreed to the foreclosure in the event that the short sale did not take place. Therefore, the district court did not abuse its discretion by refusing to impose sanctions against SunTrust. Accordingly, we affirm the district court's order.[5]

SAITTA, C.J., and DOUGLAS, CHERRY, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

THE STATE OF NEVADA, APPELLANT, *v.*
CHARLES EDWARD HUEBLER, RESPONDENT.

No. 50953

April 26, 2012 275 P.3d 91

Appeal from an order of the district court granting relief on a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Defendant convicted on guilty plea of lewdness with child under age 14 filed post-conviction petition for writ of habeas corpus. The district court granted petition, and State appealed. As matter of first impression, the supreme court, DOUGLAS, J., held that: (1) as matter of first impression, defendant did not waive habeas corpus review of claim that guilty plea was involuntary due to State's failure to disclose allegedly exculpatory material evidence in form of surveillance videotapes; (2) evidence is ''material,'' for *Brady v. Maryland*, 373 U.S. 83 (1963), purposes in the context of plea proceedings, if there was a reasonable probability that, but for the State's failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial; and (3) surveillance videotapes were not ''material'' exculpatory evidence, such that State's failure to disclose videotapes rendered guilty plea involuntary.

Reversed.

[Rehearing denied August 1, 2012]

CHERRY, J., with whom GIBBONS, J., agreed, dissented.

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[5]In their opening brief, the Joneses request that this court take judicial notice of a Department of Business and Industry order, which does not involve the parties in this appeal. Also, in its answering brief, SunTrust asks this court to strike portions of the opening brief. Having considered the requests, and in light of NRAP 27(a)(1), requiring an application for an order or other relief to be made by motion, we deny both requests.

Catherine Cortez Masto, Attorney General, Carson City; *Richard Gammick*, District Attorney, and *Gary H. Hatlestad*, Chief Appellate Deputy District Attorney, Washoe County, for Appellant.

Franny A. Forsman, Federal Public Defender, and *John C. Lambrose* and *Lori C. Teicher*, Assistant Federal Public Defenders, Las Vegas, for Respondent.

1. HABEAS CORPUS.
   To show good cause for failing to file a post-conviction petition for writ of habeas corpus within one year after the judgment of conviction became final, a petitioner must demonstrate two things: that the delay is not the fault of the petitioner and that the petitioner will be unduly prejudiced if the petition is dismissed as untimely. NRS 34.726(1).
2. HABEAS CORPUS.
   In order to show that the petitioner was not at fault for failing to file a post-conviction petition for writ of habeas corpus within one year after the judgment of conviction became final, as required to show good cause for such failure, the petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules; in this context, an ''impediment external to the defense'' may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable. NRS 34.726(1).
3. HABEAS CORPUS.
   In order to show that the dismissal of an untimely filed post-conviction petition for writ of habeas corpus would result in undue prejudice, as required to show good cause for failing to file the petition within one year after the judgment of conviction became final, a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage. NRS 34.726(1).
4. HABEAS CORPUS.
   On appeal from the dismissal of an untimely filed petition for writ of habeas corpus, the supreme court gives deference to the district court's factual findings regarding good cause for the delay, but it will review the district court's application of the law to those facts de novo. NRS 34.726(1).
5. CRIMINAL LAW.
   Brady v. Maryland, 373 U.S. 83 (1963), and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment.
6. CRIMINAL LAW.
   To prove a *Brady v. Maryland*, 373 U.S. 83 (1963), violation, the accused must make three showings: (1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) prejudice ensued, *i.e.*, the evidence was material.
7. HABEAS CORPUS.
   When a *Brady v. Maryland*, 373 U.S. 83 (1963), claim is raised in an untimely post-conviction petition for a writ of habeas corpus, a showing of good cause for the delay may be established by the petitioner pleading and proving specific facts that demonstrate that the State withheld

evidence, which would demonstrate that the delay was caused by an impediment external to the defense, and that the evidence was material, which generally demonstrates that the petitioner would be unduly prejudiced if the petition is dismissed as untimely. NRS 34.726(1).

8. CRIMINAL LAW.
   A *Brady v. Maryland*, 373 U.S. 83 (1963), claim must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense.
9. CRIMINAL LAW.
   Because a claim that the State committed a *Brady v. Maryland*, 373 U.S. 83 (1963), violation requires consideration of both factual circumstances and legal issues, the supreme court conducts a de novo review of the district court's decision resolving a *Brady* claim.
10. HABEAS CORPUS.
    Defendant did not, by pleading guilty, waive habeas corpus review of claim that guilty plea to lewdness with child under 14 years of age was involuntary due to State's failure to disclose allegedly exculpatory material evidence in form of surveillance videotapes.
11. CRIMINAL LAW.
    When a defendant pleads guilty, he waives several constitutional guarantees, including the due process right to a fair trial, and any errors that occurred before entry of the plea. U.S. CONST. amend. 14.
12. CRIMINAL LAW.
    A defendant may challenge the validity of a guilty plea based on the prosecution's failure to disclose material exculpatory information before entry of the plea.
13. CRIMINAL LAW.
    Prejudice, for purposes of a *Brady v. Maryland*, 373 U.S. 83 (1963), violation, requires a showing that the withheld evidence is material, and normally, evidence is ''material'' if it creates a reasonable doubt.
14. CRIMINAL LAW.
    Guilty pleas are presumptively valid and the defendant therefore bears a heavy burden when challenging the validity of a guilty plea.
15. CRIMINAL LAW.
    Evidence is ''material,'' for *Brady v. Maryland*, 373 U.S. 83 (1963), purposes, in the context of plea proceedings, if there was a reasonable probability that, but for the State's failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial.
16. CRIMINAL LAW.
    When a challenge to the validity of a guilty plea is based on an alleged *Brady v. Maryland*, 373 U.S. 83 (1963), violation, a defendant's affirmative assertion that, but for the State's failure to disclose *Brady* material, he or she would have pleaded not guilty and insisted on going to trial, is a subjective assertion, but the validity and reasonableness of that subjective assertion must be evaluated through an objective analysis considering the totality of the circumstances.
17. CRIMINAL LAW.
    In considering whether a guilty plea was involuntary due to an alleged *Brady v. Maryland*, 373 U.S. 83 (1963), violation, the following is a nonexhaustive list of factors to consider in applying the materiality test: (1) the relative strength and weakness of the State's case and the defendant's case; (2) the persuasiveness of the withheld evidence; (3) the reasons, if any, expressed by the defendant for choosing to plead guilty;

(4) the benefits obtained by the defendant in exchange for the plea; and (5) the thoroughness of the plea colloquy.

18. CRIMINAL LAW; HABEAS CORPUS.

Surveillance videotapes were not ''material'' exculpatory evidence, as required for defendant to demonstrate that guilty plea to lewdness with child under age 14 was involuntary, and, therefore, State's failure to disclose videotapes was not good cause for defendant's failure to file petition for writ of habeas corpus within one year after conviction became final; there was substantial evidence of defendant's guilt, including victim's statements that defendant touched her vagina and buttocks underwater while in swimming pool, surveillance tapes did not record any events underwater, and therefore, did not refute victim's claims, defendant insisted on entering guilty plea, defendant benefited from guilty plea as charges were reduced and any investigation into potential additional charges ended, and defendant indicated by signing guilty plea agreement that he entered plea voluntarily and knowingly. NRS 34.726(1).

Before the Court EN BANC.[1]

OPINION

By the Court, DOUGLAS, J.:

This case arises from an untimely post-conviction petition for a writ of habeas corpus stemming from a conviction, pursuant to a guilty plea, of lewdness with a child under 14 years of age. In his petition, respondent Charles Huebler alleged that he had good cause for his delay in filing the petition because the State improperly withheld surveillance videotapes that were exculpatory, which rendered his guilty plea involuntary. The district court granted relief to Huebler, and the State appeals.

In this appeal, we consider whether the State is required under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose material exculpatory evidence within its possession to the defense before the entry of a guilty plea. We conclude that the State is required to disclose such evidence before entry of a guilty plea. When the State fails to make the required disclosure, the defendant may challenge the validity of the guilty plea on that basis. To succeed, the defendant must demonstrate the three components of a *Brady* violation in the context of a guilty plea: that the evidence at issue is exculpatory, that the State withheld the evidence, and that the evidence was material. As to the materiality component in particular, we hold that the test is whether there is a reasonable probability or possibility (depending on whether there was a specific discovery request) that but for the State's failure to disclose the

[1]THE HONORABLE MIRIAM SHEARING, Senior Justice, was appointed by the court to sit in place of THE HONORABLE NANCY M. SAITTA, Chief Justice, who voluntarily recused herself from participation in the decision of this matter. Nev. Const. art. 6, § 19; SCR 10.

evidence the defendant would have refused to plead guilty and would have gone to trial. Because Huebler failed to demonstrate that he would have refused to plead guilty and would have gone to trial had the evidence been disclosed before the plea, we reverse the district court's order.

FACTS

A fellow resident of Huebler's apartment complex viewed Huebler swimming with children in the complex's pool, believed Huebler was acting inappropriately with the children, and called the police. A seven-year-old girl who resided at the complex told the police that Huebler touched her buttocks and vagina while they were swimming. The child victim also stated that Huebler touched her inappropriately on multiple occasions while in the swimming pool and that the touching occurred underwater. The police collected surveillance videotapes that showed Huebler and the girl together in the pool on three days.

Huebler was arrested and charged with lewdness with a child under the age of 14. Counsel was appointed to represent Huebler, and counsel filed a motion for discovery. Counsel also asked the district attorney's office if it would provide access to the surveillance videotapes; the prosecutor had not yet received a copy from the police but told defense counsel that the videotapes would be sent to the public defender's office when the district attorney's office received them. Soon after the request for the surveillance videotapes, and only one month after his arrest, Huebler entered a guilty plea to lewdness with a child under the age of 14. Huebler did not file a direct appeal.

More than two years after entry of the judgment of conviction, Huebler, with the aid of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. In his petition, Huebler alleged that, among other things, he had good cause for the delay in filing his petition because the State had violated *Brady* by withholding the surveillance videotapes. He alleged that, but for the State's failure to disclose the evidence, he would have refused to plead guilty and proceeded to trial. The State opposed the petition, arguing that Huebler failed to demonstrate cause and prejudice. The district court conducted an evidentiary hearing and granted Huebler relief, determining that the evidence was exculpatory, had been withheld by the State, and was material to Huebler's defense because the lack of access diminished his counsel's ''ability to provide a sound defense.''

On appeal, the State argues that the district court did not use the appropriate materiality standard in deciding that Huebler's *Brady* claim was sufficient to demonstrate good cause for his delay and to warrant the relief granted. We agree and reverse.

DISCUSSION

The relationship between good cause for delay in filing a petition and the test for a Brady violation

NRS 34.726 limits the time in which a post-conviction petition for a writ of habeas corpus that challenges a judgment of conviction or sentence may be filed. Such a petition must be filed within one year after entry of the judgment of conviction or, if a timely appeal is taken from the judgment, within one year after this court issues its remittitur, absent a showing of good cause for the delay. NRS 34.726(1); *Dickerson v. State*, 114 Nev. 1084, 967 P.2d 1132 (1998) (holding that NRS 34.726(1) refers to timely direct appeal). Huebler did not pursue a direct appeal, and he filed his petition on May 26, 2006, more than two years after the judgment of conviction was entered on October 24, 2003. Thus, Huebler's petition was untimely filed and procedurally barred absent a demonstration of good cause for the delay.

[Headnotes 1-4]

To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate two things: ''[t]hat the delay is not the fault of the petitioner'' and that the petitioner will be ''unduly prejudice[d]'' if the petition is dismissed as untimely. Under the first requirement, ''a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.'' *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing *Lozada v. State*, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)). ''An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.' '' *Id*. (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (citations and quotations omitted)). Under the second requirement, a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage. *Hogan v. Warden*, 109 Nev. 952, 959-60, 860 P.2d 710, 716 (1993). We give deference to the district court's factual findings regarding good cause, but we will review the court's application of the law to those facts de novo. *See Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002) (stating that district court's findings of facts are reviewed for clear error, but questions of law are reviewed de novo); *see also Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (using similar reasoning for review of claims of ineffective assistance of counsel).[2]

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[2]We recognize that *Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), states that a district court's determination regarding the existence of good cause will not be disturbed absent an abuse of discretion; however,

To demonstrate good cause for his delay, Huebler claimed below that the State violated *Brady* by withholding exculpatory evidence, that the State's withholding of the exculpatory evidence caused the delay, and that the withholding of the exculpatory evidence prejudiced him by making his guilty plea involuntary. Huebler's good-cause showing therefore is intertwined with the merits of his *Brady* claim.

[Headnotes 5-9]

'' '*Brady* and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment.' '' *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (quoting *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000)). To prove a *Brady* violation, the accused must make three showings: (1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) '' 'prejudice ensued, i.e., the evidence was material.' '' *Id.* (quoting *Mazzan*, 116 Nev. at 67, 993 P.2d at 37). When a *Brady* claim is raised in an untimely post-conviction petition for a writ of habeas corpus, the petitioner has the burden of pleading and proving specific facts that demonstrate both components of the good-cause showing required by NRS 34.726(1). *Id.* Those components parallel the second and third prongs of a *Brady* violation: establishing that the State withheld the evidence demonstrates that the delay was caused by an impediment external to the defense,[3] and establishing that the evidence was material generally demonstrates that the petitioner would be unduly prejudiced if the petition is dismissed as untimely. *Id.* Therefore, Huebler must establish both the second and third prongs of a *Brady* violation in order to overcome the procedural time bar. Because a claim that the State committed a *Brady* violation requires consideration of both factual circumstances and legal issues, we conduct a de novo review of the district court's decision resolving a *Brady* claim. *Id.* (citing *Mazzan*, 116 Nev. at 66, 993 P.2d at 36).

Guilty pleas and Brady violations

[Headnotes 10, 11]

Before addressing the substance of Huebler's *Brady* claim, we must address a threshold issue: may a defendant challenging the

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under the current statutory scheme the time bar in NRS 34.726 is mandatory, not discretionary. *State v. Dist. Ct. (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005); *State v. Haberstroh*, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003); *Pellegrini v. State*, 117 Nev. 860, 885-86, 34 P.3d 519, 536 (2001).

[3]We note that a *Brady* claim still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense. *See Hathaway v. State*, 119 Nev. 248, 71 P.3d 503 (2003). It is not clear whether Huebler demonstrated that he raised his *Brady* claim within a reasonable time after discovering it.

validity of a guilty plea assert a *Brady* claim? This issue arises because *Brady* evolved from the due process guarantee of a fair trial, *Brady*, 373 U.S. at 86-87, and therefore has been described as a trial right, *U.S. v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010), but when a defendant pleads guilty, he waives several constitutional guarantees, including the due process right to a fair trial, and any errors that occurred before entry of the plea. *Tollett v. Henderson*, 411 U.S. 258 (1973); *Webb v. State*, 91 Nev. 469, 538 P.2d 164 (1975). We have never addressed in a published opinion whether a *Brady* claim can survive the entry of a guilty plea.[4]

Several federal circuit courts of appeals have held that a *Brady* violation may be asserted to challenge the validity of a guilty plea. *E.g.*, *Sanchez v. U.S.*, 50 F.3d 1448, 1453 (9th Cir. 1995); *White v. U.S.*, 858 F.2d 416, 422 (8th Cir. 1988); *Miller v. Angliker*, 848 F.2d 1312, 1319-20 (2d Cir. 1988); *Campbell v. Marshall*, 769 F.2d 314, 321 (6th Cir. 1985); *accord State v. Sturgeon*, 605 N.W.2d 589, 596 (Wis. Ct. App. 1999). *But see Matthew v. Johnson*, 201 F.3d 353 (5th Cir. 2000) (holding that failure to disclose exculpatory evidence before entry of guilty plea does not render plea involuntary or constitute *Brady* violation). The Ninth Circuit, for example, has reasoned that '' 'a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case' '' and a waiver of the right to trial ''cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution.' '' *Sanchez*, 50 F.3d at 1453 (quoting *Miller*, 848 F.2d at 1320). A contrary decision, according to the Ninth Circuit, could tempt prosecutors ''to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas.'' *Id.*

[Headnote 12]

The validity of those decisions allowing a challenge to a guilty plea based on a *Brady* violation have been called into question following the United States Supreme Court's decision in *United States v. Ruiz*, 536 U.S. 622 (2002)—the Court's only decision to date that has addressed *Brady* in the guilty-plea context. *See U.S. v. Danzi*, 726 F. Supp. 2d 120, 127 (D. Conn. 2010) (discussing government challenge to circuit precedent based on *Ruiz*). In that case, the Supreme Court held that the Constitution does not require the prosecution to disclose *impeachment* information related to informants or other witnesses before entering a plea agreement with a defendant. *Ruiz*, 536 U.S. at 625. The *Ruiz* Court did not address the obligation to disclose *exculpatory* information; as a result, courts have split as to whether the Court's decision also en-

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[4]The parties here agree that a *Brady* claim survives the entry of a guilty plea. In particular, the State observes in its opening brief that ''[t]o rule otherwise could introduce an unacceptable level of gamesmanship into the litigation.''

compasses exculpatory information.[5] *Compare U.S. v. Conroy*, 567 F.3d 174, 178-79 (5th Cir. 2009) (rejecting argument that *Ruiz* implied that exculpatory evidence must be disclosed before guilty plea is entered), *with McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003) (reasoning that ''it is highly likely'' based on language in *Ruiz* indicating ''a significant distinction between impeachment information and exculpatory evidence'' that Supreme Court would require prosecution to disclose exculpatory evidence before guilty plea is entered). *See also Moussaoui*, 591 F.3d at 285-86 (discussing differing opinions regarding scope of *Ruiz* in dicta but leaving issue unresolved because prosecutor did not withhold exculpatory evidence). We are persuaded by language in *Ruiz* and due process considerations that a defendant may challenge the validity of a guilty plea based on the prosecution's failure to disclose material exculpatory information before entry of the plea.[6]

In holding that the Constitution does not require the prosecution to disclose impeachment information before a guilty plea is entered, the *Ruiz* Court focused on the nature of impeachment information and its limited value in deciding whether to plead guilty. The Court first looked to the requirements for a knowing and vol-

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[5]''Exculpatory evidence'' is defined as ''[e]vidence tending to establish a criminal defendant's innocence.'' *Black's Law Dictionary* 637 (9th ed. 2009). ''Impeachment evidence'' is defined as ''[e]vidence used to undermine a witness's credibility.'' *Id*.

[6]We recognize that the same piece of evidence may be characterized as both exculpatory and impeachment evidence. *Cf. Strickler v. Greene*, 527 U.S. 263, 282 n.21 (1999) (rejecting argument that withheld evidence was inculpatory and therefore did not fall under *Brady* because Court's ''cases make clear that *Brady*'s disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness''). Before *Ruiz* this distinction made little difference because both types of evidence were treated as favorable to the defense and subject to disclosure under *Brady*. *See United States v. Bagley*, 473 U.S. 667, 676 (1985) (explaining that impeachment evidence as well as exculpatory evidence falls under *Brady* and that ''Court has rejected any . . . distinction between impeachment evidence and exculpatory evidence''). For purposes of this case, we need not address whether *Ruiz* leaves open the possibility that certain types of impeachment information must be disclosed before entry of a guilty plea, *see* 536 U.S. at 633 (Thomas, J., concurring in judgment), or, if *Ruiz* does foreclose any challenge based on withheld impeachment information, whether we should recognize greater protections under the Due Process Clause of the Nevada Constitution, *cf. Roberts v. State*, 110 Nev. 1121, 881 P.2d 1 (1994) (relying on state due process guarantee in adhering to different materiality tests for *Brady* claims depending on whether there was a specific request, despite contrary Supreme Court decisions), *overruled on other grounds by Foster v. State*, 116 Nev. 1088, 13 P.3d 61 (2000). *See also* Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 Case W. Res. L. Rev. 651 (2007) (discussing flaws in *Ruiz* Court's reasoning). The State has not asserted that *Ruiz* precludes the relief granted by the district court because the evidence at issue is impeachment evidence rather than exculpatory evidence; therefore, those are issues for another day.

untary plea. The Court explained that ''[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant'' because the value of impeachment information ''will depend upon the defendant's own independent knowledge of the prosecution's potential case—a matter that the Constitution does not require prosecutors to disclose.'' *Ruiz*, 536 U.S. at 630. Because of the limited value of impeachment evidence, the Court was reluctant to distinguish it as being more important than other information of which a defendant may be ignorant but still enter a knowing and voluntary plea. *Id.* at 630-31.

The *Ruiz* Court then turned to the due process considerations that led to its decision in *Brady*, weighing the nature of the private interest at stake, the value of the additional safeguard, and any adverse impact that the additional safeguard would have on the government's interests. *Id.* at 631. Specifically, the Court repeated that the nature of impeachment information limited the added value of a right to that information before pleading guilty. And the Court rejected the idea that the additional right would have added value in reducing the chance that innocent individuals would plead guilty, in part because the plea agreement in that case stated that the prosecution would ''provide 'any information establishing the factual innocence of the defendant.' '' *Id.* Against the limited private interest and added value, the Court determined that an obligation to provide impeachment information before entry of a guilty plea ''could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.'' *Id.* Given these considerations, the Court held that ''the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.'' *Id.* at 633.

In our opinion, the considerations that led to the decision in *Ruiz* do not lead to the same conclusion when it comes to material exculpatory information. While the value of impeachment information may depend on innumerable variables that primarily come into play at trial and therefore arguably make it less than critical information in entering a guilty plea, the same cannot be said of exculpatory information, which is special not just in relation to the fairness of a trial but also in relation to whether a guilty plea is valid and accurate. For this reason, the due process calculus also weighs in favor of the added safeguard of requiring the State to disclose material exculpatory information before the defendant enters a guilty plea.

It is not every day that an innocent person accused of a crime pleads guilty, but a right to exculpatory information before entering a guilty plea diminishes the possibility that innocent persons

accused of crimes will plead guilty. *See* Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 Case W. Res. L. Rev. 651 (2007) (discussing reasons that innocent defendant might plead guilty and how *Brady* disclosure in the guilty-plea context helps reduce risk of such pleas). The distinction between exculpatory and impeachment information in this respect is implicitly recognized in the *Ruiz* Court's focus on the disclosure requirement in the plea agreement in that case, which provided that the prosecution would disclose ''any information establishing the factual innocence of the defendant.'' 536 U.S. at 631. Unlike in *Ruiz*, it is information that could establish the factual innocence of the defendant—exculpatory information—that is at issue. In turn, the adverse impact on the government of an obligation to provide exculpatory information is not as significant as the impact of an obligation to provide impeachment information. And importantly, the added safeguard comports with the prosecution's '' 'special role . . . in the search for truth.' '' *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *see also Jimenez v. State*, 112 Nev. 610, 618, 918 P.2d 687, 692 (1996) (''The prosecutor represents the state and has a duty to see that justice is done in a criminal prosecution.''); ABA Standards for Criminal Justice, Prosecution Function Standard 3-1.2(c) (3d ed. 1993) (''The duty of the prosecutor is to seek justice, not merely to convict.''); *id*. cmt. (''[I]t is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.''). We therefore hold that a defendant may challenge the validity of a guilty plea based on the prosecution's failure to disclose material exculpatory information before entry of the plea. *Cf*. RPC 3.8(d) (providing that ''prosecutor in a criminal case shall'' ''[m]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused'').

[Headnotes 13, 14]

The guilty-plea context, however, requires a different approach to the prejudice component of a *Brady* violation. Prejudice for purposes of a *Brady* violation requires a showing that the withheld evidence is ''material.'' Normally, evidence is material if it ''creates a reasonable doubt.''[7] *Mazzan*, 116 Nev. at 74, 993 P.2d at 41. That standard of materiality is not helpful in the guilty-plea context because the defendant has admitted guilt. In fashioning a materi-

[7]We have explained that when there was no defense request or only a general defense request for evidence, withheld evidence ''creates a reasonable doubt'' when ''there is a reasonable probability that the result would have been different if the evidence had been disclosed.'' *Mazzan*, 116 Nev. at 74, 993 P.2d at 41. But after a specific request for evidence, withheld evidence ''creates a reasonable doubt'' when ''there is a reasonable possibility that the undisclosed evidence would have affected the outcome.'' *Id*.

ality test in that context, we also must be mindful that guilty pleas are presumptively valid and that the defendant therefore bears a heavy burden when challenging the validity of a guilty plea. *See Molina v. State*, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

[Headnote 15]

Other courts considering this issue have applied a standard of materiality that is based on the relevance of the withheld evidence to the defendant's decision to plead guilty: ''whether there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial.'' *Sanchez*, 50 F.3d at 1454. This materiality test is similar to the prejudice test that is used to evaluate ineffective-assistance claims by a defendant who has pleaded guilty. *Cf. Hill v. Lockhart*, 474 U.S. 52 (1985) (holding that to establish prejudice prong of ineffective-assistance claim, defendant who pleaded guilty must demonstrate reasonable probability that but for counsel's deficient performance he would not have pleaded guilty and would have insisted on going to trial). We conclude that this materiality test best parallels the materiality test used for *Brady* claims in the trial context while also ensuring that guilty pleas are not lightly set aside. We therefore adopt the materiality test set forth by the Ninth Circuit in *Sanchez v. U.S.*, 50 F.3d 1448, 1454 (9th Cir. 1995), but we adhere to our decision in *Roberts v. State*, 110 Nev. 1121, 881 P.2d 1 (1994), *overruled on other grounds by Foster v. State*, 116 Nev. 1088, 13 P.3d 61 (2000), to use separate materiality tests depending on whether there was a specific request by the defense. Thus, when the defendant has made a specific request, withheld evidence is material in the guilty-plea context if there is a reasonable *possibility* that but for the failure to disclose the evidence the defendant would have refused to plead and would have insisted on going to trial.

[Headnote 16]

The materiality test is a high bar, *cf. Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) (describing ineffective-assistance test as ''high bar''), that involves both a subjective and objective component. As a threshold matter, a defendant must affirmatively assert that he would have pleaded not guilty and insisted on going to trial. *See Hill*, 474 U.S. at 60 (rejecting ineffective-assistance claim because petitioner ''did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial''). That is a subjective assertion.[8] But the validity and reasonableness

[8]Huebler's petition summarily asserts that ''[b]ut for the failure of the State to turn over this exculpatory evidence, [he] would not have pled guilty and proceeded to trial.'' We have not been asked to determine whether this assertion as sufficient to warrant an evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984).

of that subjective assertion must be evaluated through an objective analysis considering the totality of the circumstances. *See Ostrander v. Green*, 46 F.3d 347, 355 (4th Cir. 1995) (discussing prejudice prong of *Hill* and observing that ''[o]bjective analysis of the prejudice prong is probably the only workable means of applying *Hill*''), *overruled on other grounds by O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996); *see also Sanchez*, 50 F.3d at 1454 (explaining that materiality test for *Brady* violation in guilty-plea context is ''an objective one that centers on 'the likely persuasiveness of the withheld information' '' with respect to decision whether to plead guilty (quoting *Miller*, 848 F.2d at 1322)). Accordingly, the court must consider objective factors to determine whether a reasonable defendant in the same circumstances as the petitioner would have pleaded not guilty and insisted on going to trial. *See Ostrander*, 46 F.3d at 356.

[Headnote 17]

Cases from other jurisdictions provide useful guidance for evaluating whether there is a reasonable probability/possibility that, but for the failure to disclose exculpatory evidence, the defendant would have refused to plead guilty and would have insisted on going to trial. In particular, the Wisconsin Court of Appeals, which has adopted the same materiality inquiry for *Brady* claims based on withheld exculpatory evidence in the guilty-plea context, has developed the following list of factors to consider in applying the materiality test:

> (1) the relative strength and weakness of the State's case and the defendant's case; (2) the persuasiveness of the withheld evidence; (3) the reasons, if any, expressed by the defendant for choosing to plead guilty; (4) the benefits obtained by the defendant in exchange for the plea; and (5) the thoroughness of the plea colloquy.

State v. Sturgeon, 605 N.W.2d 589, 596 (Wis. Ct. App. 1999).[9] We agree that these are relevant considerations, but we also emphasize that this is not an exhaustive list and that ''[t]he particular case may present other relevant considerations.'' *Id.* With these considerations in mind, we turn to the district court's decision in this case.

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[9]Since *Sturgeon*, the Wisconsin Supreme Court has held, in light of the Supreme Court's decision in *Ruiz*, that ''due process does not require the disclosure of material exculpatory impeachment information before a defendant enters into a plea bargain.'' *State v. Harris*, 680 N.W.2d 737, 741 (Wis. 2004). But the court declined an invitation to overrule *Sturgeon* and has not determined ''whether due process requires the disclosure of purely exculpatory information prior to a plea bargain.'' *Id.* at 750 n.15.

The district court's ruling in this case

[Headnote 18]

The district court concluded that the State withheld exculpatory evidence (the surveillance tapes) and that the evidence was material because its absence adversely affected trial counsel's ''ability to provide a sound defense.''[10] On appeal, the State has focused on the materiality component of the district court's decision. We do so as well and conclude that the evidence was not material.[11]

The relevant factors support the conclusion that Huebler failed to demonstrate a reasonable possibility that he would have refused to plead guilty and would have gone to trial if the surveillance tapes had been delivered to counsel before entry of the guilty plea.

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[10]Huebler suggests that the district court also granted relief based on the State's alleged failure to disclose an audio-video recording of his police interview before entry of the plea. The district court's order does not mention this recording, and we are not convinced that the alleged failure to disclose this recording provides an alternative ground to affirm the district court's decision for three reasons. First, Huebler participated in the interview, and therefore, any *Brady* or ineffective-assistance-of-counsel claims related to the interview and the recording were reasonably available to be raised in a timely petition. Second, the interview was not exculpatory, and therefore, Huebler had no viable *Brady* claim or good-cause allegation based on the State's alleged failure to disclose the recording. And finally, even assuming the recording had any exculpatory value, Huebler failed to demonstrate it was material.

[11]Although the State's appeal focuses primarily on the materiality component of the district court's decision, a few observations are in order regarding the district court's decision on the other two components of Huebler's *Brady* claim: that the State withheld exculpatory evidence.

The district court determined that the evidence was exculpatory because it ''fails to show the crime charged.'' It is not entirely clear that the tapes tend to establish Huebler's innocence because the victim indicated that Huebler touched her buttocks and vagina underwater and the tapes do not show what occurred underwater. The State questions the district court's description of the evidence as exculpatory in the context of its argument that the evidence is not material but does not argue that the evidence is not exculpatory and therefore there was no duty to disclose it. Because the State has not challenged the district court's decision that the evidence is exculpatory, that question is not presented here and we do not answer it.

The district court also determined that the evidence had been withheld by the State. It is not clear from the district court's order that it considered whether the surveillance videotapes could have been uncovered through diligent investigation by the defense. *See Steese v. State*, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998) (''*Brady* does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense.''). There are some facts in the record to support such a conclusion. At the evidentiary hearing, Huebler's trial counsel acknowledged that she was informed of the existence of the surveillance videotapes prior to Huebler's guilty plea. Also, the police report, which Huebler's counsel acknowledged was in her possession, stated the name of the police detective to contact with questions relating to the collection of the videotapes. Again, because the State does not challenge the district court's decision that the evidence was withheld, we need not resolve this issue.

First, there was substantial evidence of Huebler's guilt given the victim's statements and Huebler's statements regarding touching the victim and past molestation allegations involving young girls. Second, the withheld evidence is not particularly persuasive; the surveillance tapes did not record any events underwater, and therefore, do not refute the victim's claims. Thus, as noted in the margin above, it is questionable whether the tapes were exculpatory at all. Third, the testimony presented at the evidentiary hearing demonstrated that Huebler insisted on entering a guilty plea. Trial counsel's testimony indicated that she told Huebler that they ''needed to look at the discovery'' before he pleaded guilty and that she told him why they needed to do that but that he insisted on moving forward with the guilty plea.[12] Fourth, Huebler received a benefit from entry of the guilty plea as the charges were reduced and any investigation into potential additional charges ended. Finally, Huebler indicated by signing the guilty plea agreement that he entered the plea voluntarily and knowingly. Based on these factors, it is clear that pre-plea disclosure of the surveillance tapes would not have caused him to refuse to plead guilty and instead insist on going to trial. Because Huebler fails to demonstrate materiality, he fails, as a matter of law, to demonstrate that any errors in the disclosure of the tapes prejudiced him. The petition therefore is procedurally barred pursuant to NRS 34.726(1). Accordingly, we reverse the district court's order.[13]

PICKERING, HARDESTY, and PARRAGUIRRE, JJ., and SHEARING, Sr. J., concur.

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[12]We note that there was little time for counsel to obtain the requested videotapes. The charging document alleged that the offense occurred on or between July 27 and 29, 2003. The waiver of preliminary examination was filed approximately three weeks later, on August 19, 2003. Huebler was arraigned in district court and entered his guilty plea ten days later, on August 29, 2003. Thus, just more than four weeks elapsed between the last date on which the offense occurred and the entry of the guilty plea.

[13]Huebler suggests that the district court's decision can be affirmed based on a meritorious ineffective-assistance claim—that trial counsel was ineffective for failing to investigate and obtain a copy of the surveillance tapes. We disagree for two reasons. First, this claim could have been raised in a timely petition and Huebler failed to explain his delay. Second, even assuming that the claim was not reasonably available to be raised in a timely petition, Huebler cannot demonstrate prejudice. In this instance, the inquiry is the same as the materiality prong of the *Brady* claim: whether Huebler would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985); *see also Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012) (explaining that *Hill* standard applies when ''a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial''). As explained in this opinion, Huebler failed to make that showing. For these reasons, Huebler's ineffective-assistance claim is procedurally barred under NRS 34.726.

CHERRY, J., with whom GIBBONS, J., agrees, dissenting:

The district court held that respondent Charles Huebler had demonstrated cause and prejudice to excuse the untimely filing of his post-conviction petition for a writ of habeas corpus based on a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), that made his guilty plea involuntary and that Huebler therefore was entitled to withdraw his guilty plea. The court now concludes that even assuming that the evidence was withheld by the State and is exculpatory (two points that the court does not entirely embrace), Huebler failed to demonstrate that the evidence was material and therefore the district court's order must be reversed. I would conclude that the evidence is exculpatory and was withheld by the State, but then remand for the district court to apply the correct test for materiality (as set forth by the court).

I agree with the court that a *Brady* claim survives the entry of a guilty plea in that the State has a constitutional duty to disclose material exculpatory information that is within the State's possession before entering a plea agreement with a defendant. *See, e.g.*, *McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003). I also find no fault in the court's articulation of the prejudice component of such a *Brady* claim, that withheld evidence is material if the defendant demonstrates a reasonable probability or possibility (depending on whether there was a specific request for evidence) that but for the failure to disclose the evidence he or she would have refused to plead guilty and would have insisted on going to trial. Where I must part company with my colleagues is in applying the three prongs of a *Brady* claim to the facts and circumstances presented in this case.

The starting point is whether the evidence at issue is exculpatory. The court suggests in the margin of its decision that the surveillance videotapes may not be exculpatory because the victim described the lewd acts as occurring underwater and the videotapes do not depict what occurred underwater. I cannot agree with this suggestion that the videotapes are not exculpatory. In my view, the videotapes tend to establish Huebler's innocence because they show appropriate interactions between an adult and child in a swimming pool and show no conduct or reactions on any individual's part that would suggest there had been any lewd or lascivious acts involving Huebler and the victim.

The next consideration is whether the State withheld the evidence. The court suggests, again in the margin of its decision, that certain facts in the record would support a conclusion that the evidence could have been uncovered by the defense through diligent investigation. While defense counsel may have been able to contact law enforcement to obtain the videotapes (the police report included the name of the detective who could be contacted with

questions related to the collection of the videotapes), the duty under *Brady* is the prosecutor's, and defense counsel had requested the videotapes and been told that the prosecutor would provide them to defense counsel (albeit at some later unspecified time after they had been provided to the prosecutor). *Cf. Jimenez v. State*, 112 Nev. 610, 620, 918 P.2d 687, 693 (1996) (''[E]ven if the detectives withheld their reports without the prosecutor's knowledge, 'the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers.' '' (quoting *Gorham v. State*, 597 So. 2d 782, 784 (Fla. 1992))); *see also Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003) (stating that ''[t]he defendant's duty to exercise due diligence in reviewing *Brady* material applies only after the State discloses it'' and therefore ''[o]nce the State obtained the results of the hair analysis, it was required to disclose them to the defendant'').

The final consideration is whether the evidence is material. On this point it is clear that the district court did not apply the correct test for materiality, focusing instead on the impact that the videotapes' absence had on defense counsel's ''ability to provide a sound defense.'' Under the circumstances, I would remand for the district court to apply the correct test in the first instance. In my view, a remand is appropriate because many of the relevant factors involve factual and credibility determinations that should be made by the district court.

In sum, while I applaud the court's recognition that the State has a constitutional duty to disclose material exculpatory information within its possession before entering a plea agreement with a defendant, I cannot agree with its application of the law to this case. Rather, I agree with the district court that the evidence at issue is exculpatory and was withheld by the State and would remand for the district court to apply the correct test for materiality.

I must also comment on footnote 13 and the discussion preceding footnote 12 in the majority opinion. I have reviewed the transcript of the evidentiary hearing in the court below and the testimony provided at the hearing and it demonstrates both factually and legally why Huebler should have been allowed to withdraw his guilty plea and that the district court was correct in its ruling.

Trial counsel had defended clients charged with misdemeanors for only two weeks, and then began representing clients charged with felonies. She had less than one year of experience when she represented Huebler. This case was the first time counsel had represented a defendant charged with a sexual offense and the first time one of her clients faced a possible life sentence. The record further reveals that Huebler had attempted suicide, was on suicide watch, and was incredibly depressed. Huebler waived a preliminary hearing to plead to one count of lewdness, and the second

count would be dismissed. Counsel had requested discovery but did not receive either the video surveillance or video recording of Huebler's interrogation. Counsel knew these videos existed, but had not received them.

Counsel testified at the evidentiary hearing that if she had received these videos, she could have stopped Huebler from entering a plea. Even more enlightening is counsel's profound revelation that after she finally reviewed the tapes, she would have thrown herself into traffic to prevent Huebler's guilty plea.

Looking at the totality of circumstances in this contested matter, I would remand this case back to the district court to apply the correct test for materiality and for further hearings on whether Huebler can, in fact, show prejudice so that his ineffective assistance claim is not procedurally barred. In light of the Supreme Court's recent landmark decision emphasizing the importance of the right to effective assistance of counsel during plea bargaining, *see Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012), it is imperative that the instant case be remanded to the trial court in order that a finding be made as to whether trial counsel, who allowed a plea to be entered without the benefit of crucial discovery, was ineffective.

VINCENT T. SCHETTLER; AND VINCENT T. SCHETTLER, TRUSTEE OF VINCENT T. SCHETTLER LIVING TRUST, APPELLANTS, *v.* RALRON CAPITAL CORPORATION, A NEVADA CORPORATION, RESPONDENT.

No. 56508

May 3, 2012 275 P.3d 933

Appeal from a district court summary judgment in a contract action. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Successor in interest to failed bank brought claim against debtor for breach of loan agreement and promissory note. The district court granted summary judgment to successor in interest. Debtor appealed. The supreme court, HARDESTY, J., held that: (1) as a matter of first impression, with respect to claims relating to the acts or omissions of a failed bank, a successor in interest to failed bank is entitled to benefit from Financial Institutions Reform, Recovery, and Enforcement Act of 1989's (FIRREA's) jurisdictional bar of claims against failed bank that were not first presented for administrative consideration under FIRREA; (2) failure of Federal Deposit Insurance Corporation (FDIC) to mail debtor notice of

deadline for filing administrative claims against failed bank for which FDIC was acting as receiver did not violate debtor's due process rights such that debtor could avoid FIRREA's jurisdictional bar; (3) as a matter of first impression, FIRREA's jurisdictional bar did not apply to defenses or affirmative defenses; and (4) material issues of fact existed as to whether successor in interest breached loan agreement so as to entitle debtor to affirmative defense of recoupment.

Reversed and remanded.

Feldman Graf and *Rusty Graf*, Las Vegas; *White & Case, LLP*, and *Roberto J. Kampfner*, Los Angeles, California, for Appellants.

Robison, Belaustegui, Sharp & Low and *Mark G. Simons*, Reno, for Respondent.

1. APPEAL AND ERROR.
   Statutory construction issues are questions of law that the supreme court reviews de novo.
2. APPEAL AND ERROR.
   Subject matter jurisdiction is a question of law subject to de novo review.
3. APPEAL AND ERROR.
   The supreme court reviews the district court's grant of summary judgment de novo, without deference to the findings of the district court.
4. JUDGMENT.
   Summary judgment is appropriate when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law. NRCP 56(c).
5. BANKS AND BANKING.
   With respect to claims relating to the acts or omissions of a failed bank, a successor in interest to failed bank is entitled to benefit from Financial Institutions Reform, Recovery, and Enforcement Act of 1989's (FIRREA's) jurisdictional bar of claims against failed bank that were not first presented for administrative consideration under FIRREA. 12 U.S.C. § 1821(d)(13)(D).
6. BANKS AND BANKING; CONSTITUTIONAL LAW.
   Failure of Federal Deposit Insurance Corporation (FDIC) to mail debtor notice of deadline for filing administrative claims against failed bank for which FDIC was acting as receiver did not violate debtor's due process rights such that debtor could avoid Financial Institutions Reform, Recovery, and Enforcement Act of 1989's (FIRREA's) jurisdictional bar of claims involving failed bank that were not first presented for administrative consideration under FIRREA; debtor had actual notice that FDIC had become receiver for failed bank, and FDIC had published notice of claims process and administrative deadline in local newspapers. U.S. CONST. amend. 5.; 12 U.S.C. § 1821(d)(13)(D).
7. BANKS AND BANKING.
   Financial Institutions Reform, Recovery, and Enforcement Act of 1989's (FIRREA's) jurisdictional bar of claims involving failed bank that

were not first presented for administrative consideration under FIRREA does not apply to defenses or affirmative defenses. 12 U.S.C. § 1811 *et seq*.

8. PLEADING.
   Recoupment must be pleaded affirmatively, and if it is not raised, it is ordinarily deemed waived; however, if a plaintiff had notice that a defendant was relying on recoupment, the affirmative defense will be allowed.
9. SET-OFF AND COUNTERCLAIM.
   Recoupment must arise out of the same transaction and involve the same parties; thus, it does not apply when the defendant's allegations arise out of a transaction extrinsic to the plaintiff's cause of action.
10. SET-OFF AND COUNTERCLAIM.
    Recoupment does not allow the defendant to pursue damages in excess of the plaintiff's judgment award.
11. BILLS AND NOTES.
    Successor in interest to failed bank's loan agreement and promissory note with debtor who purchased loan from receiver of failed bank was not holder in due course so as to be immune from debtor's affirmative defense of recoupment against successor in interest's claim against debtor for breach of contract; holder who purchased note after maturity and in default was not holder in due course, and receiver was not holder in due course that could give successor in interest as transferee rights of holder in due course. NRS 104.3203(2), 104.3302(1).
12. JUDGMENT.
    Material issues of fact existed as to whether successor in interest of failed bank breached bank's loan agreement with debtor so as to entitle debtor to affirmative defense of recoupment against any amount awarded to successor in interest in successor in interest's claim for breach of contract against debtor, precluding summary judgment for successor in interest.

Before DOUGLAS, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we consider whether the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821 (2006), an act that governs the disposition of failed financial institutions' assets, divests a court of jurisdiction to consider any defense or affirmative defense not first adjudicated through FIRREA's claims process. As part of our inquiry, we must determine an issue of first impression in Nevada regarding whether FIRREA's jurisdictional bar extends to successors in interest to the Federal Deposit Insurance Corporation (FDIC). We conclude that while FIRREA's jurisdictional bar divests a district court of jurisdiction to consider claims and counterclaims asserted against a successor in interest to the FDIC not first adjudicated through FIRREA's claims process, it does not apply to defenses or

affirmative defenses raised by a debtor in response to the successor in interest's complaint for collection.

FACTS AND PROCEDURAL HISTORY

On September 15, 2006, appellant Vincent T. Schettler and Silver State Bank executed a Business Loan Agreement (the Loan) and a Promissory Note (the Note), under which Silver State provided Schettler with a $2,000,000 revolving line of credit. Schettler agreed to pay interest on the loan monthly until the loan's maturity date, at which time he would be required to pay all outstanding principal and any remaining unpaid accrued interest. The original maturity date of the Loan and the Note was September 15, 2007. On that date, Schettler and Silver State entered into a Change in Terms Agreement that modified the maturity date to September 15, 2008. That same day, Schettler also executed a Commercial Guaranty in his capacity as Trustee for the Vincent T. Schettler Living Trust, guaranteeing to pay all of the Loan obligations.[1] It is undisputed that the Loan, the Note, and the Commercial Guaranty (loan agreement) were valid and enforceable contracts at their inception.

According to Schettler, he and Silver State were in the process of again modifying the maturity date when, on August 14, 2008, Silver State notified Schettler by letter that it had frozen the remaining funds available on the line of credit because of a material change in Schettler's financial condition or, in Silver State's belief, his prospect of performance on the Note was impaired. Silver State also informed Schettler that it had decided ''to cancel any current commitments'' until Schettler cured the ''[d]efaults,'' but that ''[u]ntil that time, [Schettler was] responsible for payment of interest on the loan.'' At the time of the default notice, however, Schettler was current on his payments, and the loan had an outstanding principal balance of $1,114,000.

A few weeks later, on September 5, 2008, Silver State was placed into receivership, and the FDIC was appointed as receiver. That same day, the FDIC informed Schettler that it was the receiver for Silver State and that it expected Schettler to continue to abide by the terms and conditions of the Loan and the Note. The FDIC subsequently published notices in local Las Vegas newspapers that required all creditors having claims against Silver State to submit their claims to the FDIC by December 10, 2008, after which a creditor's claim would be barred. Schettler did not pay the

[1]Throughout this opinion, appellants Vincent T. Schettler individually and Vincent T. Schettler as Trustee of the Vincent T. Schettler Living Trust will be referred to collectively as Schettler.

outstanding principal and interest by the September 15 maturity date or file any administrative claims against Silver State with the FDIC by December 10.

In March 2009, respondent RalRon Capital Corporation acquired ownership of Schettler's loan agreement. The terms of RalRon's acquisition are not clear from the record. Shortly thereafter, RalRon notified Schettler that it owned the Loan and Note and ''demand[ed] that payment of the full amount of principal, interest, and late fees . . . be made within 10 days.'' After nonpayment from Schettler, RalRon filed a complaint in the district court, asserting claims for breach of contract, contractual breach of the implied covenant of good faith and fair dealing, unjust enrichment, and breach of personal guaranty. Schettler filed an answer to RalRon's complaint, denying liability, and asserting several affirmative defenses and counterclaims against RalRon for breach of contract, breach of the implied covenant of good faith and fair dealing, and estoppel.

RalRon moved for summary judgment on its breach of contract and breach of personal guaranty claims[2] and on Schettler's counterclaims. RalRon argued that there was no genuine issue of material fact for trial, that Schettler's counterclaims and ''alleged defenses'' were barred because Schettler failed to file any administrative claims with the FDIC as required by FIRREA, and that RalRon was a holder in due course immune from Schettler's defenses. Schettler opposed the motion and disputed RalRon's FIRREA argument. He also argued that there existed questions of fact for trial, that the FDIC's failure to mail Schettler notice of the bar date should have ''allow[ed] the administrative process to begin anew,'' and that Silver State anticipatorily breached the loan agreement before any default by Schettler. After a hearing, the district court granted summary judgment in favor of RalRon on its claims for breach of contract and breach of personal guaranty. In so doing, the district court barred Schettler's affirmative defenses and dismissed his counterclaims, reasoning that, because they were all essentially claims against the FDIC and Schettler had failed to follow the claims administration process, they were barred by FIRREA. The court further determined that Schettler received adequate notice of the bar date. Schettler filed a motion for reconsideration, which the district court denied. The district court subsequently entered judgment against Schettler for the outstanding principal and interest on the loan and for RalRon's attorney fees and costs. This appeal followed.

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[2]RalRon did not pursue its claims for breach of the implied covenant of good faith and fair dealing or unjust enrichment. It later characterized them as ''moot.'' Thus, we do not discuss them further in this opinion.

DISCUSSION

We begin with an overview of FIRREA and examine whether a successor in interest to a failed financial institution is entitled to benefit from FIRREA's jurisdictional bar. We conclude that the bar applies to claims or counterclaims asserted by a debtor who failed to file an administrative claim with the FDIC. We next address whether FIRREA's jurisdictional bar precludes a court's consideration of the debtor's assertion of defenses and affirmative defenses in response to a complaint for collection. After concluding that the bar does not apply to affirmative defenses, we address whether Schettler's answer raised affirmative defenses or, as RalRon argues on appeal, ''claims'' that the district court correctly refused to consider. Because we conclude that Schettler raised affirmative defenses not barred by FIRREA, we reverse the district court's grant of summary judgment in favor of RalRon precluding Schettler's affirmative defenses.

[Headnotes 1-4]

Because our analysis involves questions of law pertaining to statutory construction and a district court's subject matter jurisdiction, de novo review applies. *See Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 533, 245 P.3d 1149, 1153 (2010) (explaining that statutory construction issues are '' 'question[s] of law that this court reviews de novo' '' (quoting *A.F. Constr. Co. v. Virgin River Casino*, 118 Nev. 699, 703, 56 P.3d 887, 890 (2002))); *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009) (''Subject matter jurisdiction is a question of law subject to de novo review.''). Additionally, ''[t]his court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.'' *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). ''Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.' '' *Id.* (second alteration in original) (quoting NRCP 56(c)).

Overview of FIRREA

''Congress enacted [FIRREA] to enable the federal government to respond swiftly and effectively to the declining financial condition of the nation's banks and savings institutions. The statute grants the FDIC, as receiver, broad powers to determine claims asserted against failed banks.'' *Henderson v. Bank of New England*, 986 F.2d 319, 320 (9th Cir. 1993) (citing 12 U.S.C. § 1821(d)(3)(A)). To enable the FDIC's powers, ''Congress created a claims process for the filing, consideration[,] and determination of claims against insolvent banks'' that encourages the

FDIC to quickly resolve claims without overburdening the courts. *Id.* (citing 12 U.S.C. § 1821(d)(3)-(10)). Accordingly, ''[i]f [a] financial institution has failed, . . . subsequent claims must be presented first to the FDIC for an administrative determination on whether they should be paid.'' *Aber-Shukofsky v. JPMorgan Chase & Co.*, 755 F. Supp. 2d 441, 445 (E.D.N.Y. 2010).

To begin the administrative claims process, the FDIC must publish notice to creditors of the claims process and the date by which creditors must file their claims against the financial institution—the bar date. 12 U.S.C. § 1821(d)(3)(B). The FDIC must also mail such notice to any creditor shown on the institution's books and records or any creditor that the FDIC later discovers. *Id.* § 1821(d)(3)(C). ''Once a claim is filed, the FDIC has 180 days to determine whether to allow or disallow the claim.'' *Henderson*, 986 F.2d at 320 (citing 12 U.S.C. § 1821(d)(5)(A)(i)). ''If the claim is disallowed, or if the 180 days expire without a determination by the FDIC, then the claimant may request further administrative consideration of the claim, or seek judicial review.'' *Id.* (citing 12 U.S.C. § 1821(d)(6)).

Importantly, ''[a] claimant must . . . first complete the claims process before seeking judicial review.'' *Id.* at 321. If the claims process is not followed, then FIRREA bars judicial jurisdiction:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over—
>
> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the [FDIC] as receiver.

12 U.S.C. § 1821(d)(13)(D); *see also* 9 C.J.S. *Banks and Banking* § 743 (2008) (''A party who has been notified of the appointment of the [FDIC] as receiver, and who fails to initiate an administrative claim within the filing period, forfeits any right to pursue a claim against the institution's assets in any court.'').

The applicability of FIRREA to this case

Schettler argues on appeal that FIRREA does not apply here because the proceedings below involved RalRon rather than the FDIC and because the FDIC failed to mail him notice of the specified bar date for filing his claims against Silver State. RalRon argues that because it is a successor in interest to the FDIC, it is entitled to benefit from FIRREA's jurisdictional bar. RalRon further argues that because Schettler was not a creditor, he was not entitled to no-

tice, and, even if he were entitled to notice, the FDIC's failure does not excuse Schettler's duty to comply with FIRREA.

RalRon, as a successor in interest to the FDIC, is entitled to benefit from FIRREA's jurisdictional bar of claims

FIRREA's jurisdictional bar applies to ''any claim or action for payment from . . . or . . . seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver'' and to ''any claim relating to any act or omission of such institution or the [FDIC] as receiver.'' 12 U.S.C. § 1821(d)(13)(D). Schettler argues that the underlying action, which was filed ''by a third party'' instead of the FDIC, ''cannot possibly affect Silver State's receivership estate, and FIRREA should be inapplicable.'' Conversely, RalRon maintains that its successor status entitles it to benefit from FIRREA's jurisdictional bar. In determining whether the statute allows a successor in interest to a failed financial institution to benefit from FIRREA's jurisdictional bar, we examine the rationale from other jurisdictions that have addressed the issue.

The federal courts, by and large, that have considered the issue have concluded that a successor in interest is entitled to benefit from FIRREA's jurisdictional bar against claims falling within the statute's terms that have not been administratively pursued. For example, the Ninth Circuit Court of Appeals has explained that FIRREA's jurisdictional bar, with respect to claims relating to acts or omissions of the failed bank or receiver, ''distinguishes claims on their factual bases rather than on the identity of the defendant,'' and ''does not make any distinction based on the identity of the party from whom relief is sought.'' *Benson v. JPMorgan Chase Bank, N.A.*, 673 F.3d 1207, 1212 (9th Cir. 2012). Thus, ''FIRREA's jurisdictional bar applies to claims asserted against a purchasing bank when the claim is based on the conduct of the failed institution.'' *Id.* at 1214-15 (also explaining that FIRREA's jurisdictional bar applied because ''[t]he bulk of plaintiffs' claims plainly qualif[ied] as '*functionally*, albeit not *formally*,' against a failed bank'' (quoting *American Nat. Ins. Co. v. F.D.I.C.*, 642 F.3d 1137, 1144 (D.C. Cir. 2011))).

The Eastern District of New York has explained that successors in interest can benefit from FIRREA's jurisdictional bar because the jurisdictional bar ''refers to '*any claim* relating to any act or omission' of a failed institution and does not make its application contingent upon whom the claim is against. Thus, the statutory provision, by its plain language, applies with equal force to a successor in interest to the failed institution.'' *Aber-Shukofsky*, 755 F. Supp. 2d at 447 (quoting 12 U.S.C. § 1821(d)(13)(D)(ii)). The court concluded that, ''given the plain language of FIRREA,'' the

plaintiffs could not ''evade FIRREA's mandatory exhaustion requirement simply by asserting claims against [the] defendants, as third-party purchasers of the failed bank's assets, for acts or omissions that relate to [the failed bank].'' *Id.*

[Headnote 5]

The Sixth Circuit and Eleventh Circuit Courts of Appeals have also applied the jurisdictional bar to claims made against a successor in interest to the FDIC. *Village of Oakwood v. State Bank and Trust Co.*, 539 F.3d 373, 386 (6th Cir. 2008) (concluding that to allow claimants to circumvent the provisions of FIRREA's jurisdictional bar '' 'by bringing claims against the assuming bank . . . would encourage the very litigation that FIRREA aimed to avoid' '' (alteration in original) (quoting *Village of Oakwood v. State Bank and Trust Co.*, 519 F. Supp. 2d 730, 738 (N.D. Ohio 2007))); *American First Federal v. Lake Forest Park*, 198 F.3d 1259, 1263 n.3 (11th Cir. 1999) (''AFF, having purchased the note from the [receiver], stands in the shoes of the [receiver] and acquires its protected status under FIRREA. Thus, if Lake Forest is barred from asserting this claim against the [receiver], it is similarly barred from asserting it against AFF.'' (internal citations omitted)). We agree with the reasoning of these federal courts and similarly conclude that, with respect to claims relating to acts or omissions of the failed bank, a successor in interest is entitled to benefit from FIRREA's jurisdictional bar.

The FDIC's failure to mail Schettler the required notice does not preclude summary judgment

The parties do not dispute that the FDIC failed to mail Schettler the required notice. Schettler maintains on appeal that because the FDIC did not mail him notice of the bar date, ''applying [FIRREA's jurisdictional bar] to the facts of this case would violate due process.'' We disagree and conclude that Schettler's due process argument lacks merit.[3]

[Headnote 6]

In *Elmco Properties v. Second National Federal Savings Ass'n*, the Fourth Circuit Court of Appeals held that the denial ''as untimely the claim of one who never—via formal mailed notice or

[3]We note that FIRREA mandates only that the FDIC mail the required notice ''to any creditor shown on the institution's books,'' or to any creditor not on the books that the FDIC later discovers. 12 U.S.C. § 1821(d)(3)(C); *see also Tri-State Hotels, Inc. v. F.D.I.C.*, 79 F.3d 707, 716 (8th Cir. 1996) (explaining that when a claimant ''is not a creditor, and is not listed on the books . . . as a creditor, it [is] not entitled to receive notice by mail''). Schettler admits that he does not know whether he became a known creditor. Thus, we make no determination as to whether the FDIC was required to mail Schettler notice.

otherwise—is given constitutionally sufficient notice of the requirement that he file his claim before the bar date . . . violates due process.'' 94 F.3d 914, 920 (4th Cir. 1996). However, the court also explained that a claimant ''may not complain of its lack of formal notice if it actually knew enough about the situation to place it on 'inquiry notice' as to the details of the administrative process.'' *Id.* at 921. Importantly, the court explained that ''if [a claimant] had timely, actual knowledge that [the bank] had entered receivership, its due process argument might be defeated by its own failure to act on that knowledge to protect its rights.'' *Id.* at 922. Here, on the day the FDIC became the receiver for Silver State, the FDIC notified Schettler that it was the receiver and that ''[his] loan [was] now held by the [r]eceiver.'' The FDIC also published notice of the claims process and the bar date in local Las Vegas newspapers. As such, we conclude that Schettler received constitutionally sufficient notice of the bar date, regardless of his creditor status. *Accord RTC Mortg. Trust 1994-N2 v. Haith*, 133 F.3d 574, 579 (8th Cir. 1998) (explaining that the FDIC is not required to mail notice '' 'to claimants who are aware of the appointment of a receiver but who do not receive notice of the filing deadline' '' (quoting *Reierson v. Resolution Trust Corp.*, 16 F.3d 889, 891-92 (8th Cir. 1994))).

In addition, the FDIC's failure to mail Schettler notice of the administrative claims bar date does not excuse Schettler from having to exhaust his administrative remedies to pursue claims pursuant to FIRREA's claims process. *See Intercontinental Travel Marketing v. F.D.I.C.*, 45 F.3d 1278, 1284-85 (9th Cir. 1994) (stating that as long as the FDIC does not engage in affirmative misconduct, its failure to notify a creditor or claimant by mail does not excuse that creditor or claimant from having to exhaust FIRREA administrative remedies and noting that while FIRREA ''seems to make the mailing requirement imperative for the FDIC, the statute imposes no consequence on the FDIC for failure to do so''); *see also Tri-State*, 79 F.3d at 716 (''[T]he FDIC's failure to provide proper notice [of the administrative claims bar date] 'does not relieve the claimant of the obligation to exhaust administrative remedies, because the statute does not provide for a waiver or exception under those circumstances.' '' (quoting *Freeman v. F.D.I.C.*, 56 F.3d 1394, 1402 (D.C. Cir. 1995))). Thus, we conclude that the FDIC's failure to mail Schettler the required notice does not negate FIRREA's applicability to an evaluation of Schettler's claims against RalRon in this case.

In sum, we conclude that RalRon, as a successor in interest to the FDIC, is entitled to benefit from FIRREA's jurisdictional bar for claims made against it, despite the FDIC's failure to mail Schettler the required notice. We now turn our attention to whether FIRREA's jurisdictional bar of claims also bars defenses and af-

firmative defenses asserted by a debtor and whether, here, the district court erred when it rejected Schettler's affirmative defenses.

FIRREA's jurisdictional bar does not apply to defenses or affirmative defenses

Convincingly, a majority of courts addressing this issue have held that while FIRREA's jurisdictional bar applies to claims and counterclaims, it does not apply to defenses and affirmative defenses.[4] *See, e.g.*, *American First Federal v. Lake Forest Park*, 198 F.3d 1259, 1264 (11th Cir. 1999) (noting that the ''circuit courts that have addressed the question have held that affirmative defenses are not subject to the requirements of exhaustion under [FIRREA's jurisdictional bar]''); *Bolduc v. Beal Bank, SSB*, 167 F.3d 667, 671 (1st Cir. 1999); *Tri-State Hotels, Inc. v. F.D.I.C.*, 79 F.3d 707, 715 (8th Cir. 1996); *Resolution Trust Corp. v. Love*, 36 F.3d 972, 977 (10th Cir. 1994) (''Significantly, the statute never uses the term 'defense', 'affirmative defense' or 'potential affirmative defense.' ''); *National Union Fire Ins. v. City Sav., F.S.B.*, 28 F.3d 376, 393 (3d Cir. 1994); *Resolution Trust v. Midwest Fed. Sav. Bank*, 36 F.3d 785, 793 (9th Cir. 1993).

[Headnote 7]

The Third Circuit Court of Appeals, which has examined this issue in detail, has explained that FIRREA's jurisdictional bar only applies to four categories of actions:

> (1) claims for payment from assets of any depository institution for which the [FDIC] has been appointed receiver; (2) actions for payment from assets of such depository institution; (3) actions seeking a determination of rights with respect to assets of such depository institution; and (4) a claim relating to any act or omission of such institution or the [FDIC] as receiver.

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[4]Although some federal district courts have extended FIRREA's jurisdictional bar to also apply to affirmative defenses, *see, e.g.*, *Federal Sav. v. McGinnis, Juban, Bevan et al.*, 808 F. Supp. 1263, 1280 (E.D. La. 1992) (noting that under FIRREA's jurisdictional bar, a court ''does not have jurisdiction to adjudicate the defenses arising out of the FDIC's fault, because the defenses have not been through the administrative process''), others have explained that applying FIRREA's jurisdictional bar to affirmative defenses contravenes the plain language of the statute and would require parties ''who have no independent basis for bringing an action against the [FDIC] and against whom the [FDIC] has not brought suit, to present to the [FDIC] as receiver any potential defenses that they might have to any claims that the [FDIC] . . . might one day assert against them, which are as yet unknown.'' *Resolution Trust Corp. v. Conner*, 817 F. Supp. 98, 102 (W.D. Okla. 1993); *see also Resolution Trust v. Midwest Fed. Sav. Bank*, 36 F.3d 785, 793 (9th Cir. 1993) (''Having reviewed the reasoning behind the holdings on both side[s] of the debate, we are persuaded that [FIRREA's jurisdictional bar] does not divest a district court of jurisdiction over an affirmative defense.'').

National Union, 28 F.3d at 393. The court held that these categories did not include a defense or an affirmative defense because those are ''neither an 'action' nor a 'claim,' but rather . . . a *response* to an action or a claim.'' *Id*. Therefore, it held, ''[t]he jurisdictional bar contained in § 1821(d)(13)(D) . . . does not apply to defenses or affirmative defenses.'' *Id*. To support its conclusion, the court explained that interpreting FIRREA's jurisdictional bar to include defenses and affirmative defenses ''would, in a substantial number of cases, . . . result in an unconstitutional deprivation of due process.'' *Id*. at 394. Specifically, ''[i]f parties were barred from presenting defenses and affirmative defenses to claims which have been filed against them, they would not only be unconstitutionally deprived of their opportunity to be heard, but they would invariably lose on the merits of the claims brought against them.'' *Id*. Beyond constitutional concerns, the court also explained that because a defendant is unable to know what his or her defense will be before hearing the claim, ''it seems that it would be nearly impossible for a party to submit future hypothetical defenses to the administrative claims procedure—defenses to lawsuits which may not yet have [been] brought against [a party] or which may never be brought at all.'' *Id*. at 395. We join in the majority's reasoning and conclude that while FIRREA's jurisdictional bar applies to claims and counterclaims, it does not apply to defenses or affirmative defenses. We now turn our attention to whether the district court was precluded from considering Schettler's affirmative defenses on the basis that they are more accurately viewed as counterclaims barred by § 1821(d)(13)(D).

Schettler's affirmative defenses

At the outset, we note that Schettler asserted numerous affirmative defenses below in response to RalRon's complaint. On appeal, however, Schettler limits his argument to the affirmative defense based on breach of contract, claiming that it is allowed under FIRREA. The disputed affirmative defense states as follows: ''To the extent that any contract between these parties is supported by adequate consideration, Plaintiffs have failed to fulfill and perform their obligations and duties to Defendant under that contract and is therefore barred from enforcing the same against the Defendants.'' On appeal, Schettler asserts that this affirmative defense is based on allegations that Silver State wrongfully defaulted Schettler. Similar assertions are made in Schettler's counterclaims.

[Headnote 8]

True affirmative defenses, under NRCP 8(c), include those encompassing '' 'new facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all allegations in the complaint are

true.' ''[5] *Clark Cty. Sch. Dist. v. Richardson Constr.*, 123 Nev. 382, 392-93, 168 P.3d 87, 94 (2007) (alteration in original) (quoting *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003)) (describing NRCP 8(c)'s ''catchall'' provision, which states that a plaintiff must affirmatively set forth ''any other matter constituting an avoidance or affirmative defense''). Thus, in actions based on a contract, one type of ''affirmative defense impliedly admits the sufficiency of the underlying contract, but offers an excuse for the defendant's failure to perform.'' 17B C.J.S. *Contracts* § 891 (2011); *see also Durell v. Sharp Healthcare*, 108 Cal. Rptr. 3d. 682, 697 (Ct. App. 2010); *Richardson*, 123 Nev. at 394 n.21, 168 P.3d at 95 n.21. Here, based on his general breach of contract allegation, Schettler may be able to demonstrate that Silver State's prior breach of the contract has rendered the contract unenforceable.[6] *See* Restatement (Second) of Contracts § 237 cmt. a (1981); 17A Am. Jur. 2d *Contracts* § 685 (2004). This allegation constitutes a true affirmative defense. Further, the affirmative defense, especially when viewed in light of Schettler's counterclaims, inherently raises recoupment.[7]

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[5]NRCP 8(c)'s stated permissible affirmative defenses include ''accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, [and] waiver.''

[6]In its complaint, RalRon alleged that ''RalRon has fully performed any and all obligations owed of it under said agreements,'' as is generally required to plead a claim for breach of contract. *See* 17B C.J.S. *Contracts* § 879 (2011); *see also Durell v. Sharp Healthcare*, 108 Cal. Rptr. 3d. 682, 697 (Ct. App. 2010). In its answer, Schettler alleged that both ''Silver State *and* its successor-in-interest, [RalRon], breached th[e] agreement.'' To the extent that Schettler argues that RalRon breached, this is not a new fact or argument because Schettler already generally denied RalRon's allegation as part of his complaint, and thus, is properly asserted as a defense. *Clark Cty. Sch. Dist. v. Richardson Constr.*, 123 Nev. 382, 392-93, 168 P.3d 87, 94 (2007); *National Union*, 28 F.3d at 393 (''The defense may be as simple as a flat denial of the other party's factual allegations . . . .'' ' (quoting *Black's Law Dictionary* 419 (6th ed. 1990))).

[7]NRCP 8(c) requires the court to treat Schettler's counterclaims as affirmative defenses: ''When a party has mistakenly designated a . . . counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.'' Although Schettler did not specifically allege that he was entitled to ''recoupment'' in his answer to RalRon's complaint, when construed as a whole, his answer sufficiently encompassed the concept of recoupment. *See, e.g.*, *Carlund Corp. v. Crown Center Redev.*, 849 S.W.2d 647, 651 n.3 (Mo. Ct. App. 1993) (noting that although a defendant ''in its answer did not specifically plead 'recoupment' as an affirmative defense, its counterclaim inherently plead[ed] the defense of recoupment''). ''Recoupment must be pleaded affirmatively, and if it is not raised it is ordinarily deemed waived.'' *Federal Deposit Ins. Corp. v. Notis*, 602 A.2d 1164, 1165 (Me. 1992). However, ''if [a] plaintiff had notice that [a] defendant was relying on recoupment, the affirmative defense will be allowed.'' *Id.*;

[Headnotes 9-11]

Recoupment is ''[a] right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract.'' *Black's Law Dictionary* 1275 (6th ed. 1990). Recoupment must arise out of the same transaction and involve the same parties; thus, it does not apply when the defendant's allegations arise out of a transaction ''extrinsic to the plaintiff's cause of action.'' *Id.*; *see also Bolduc v. Beal Bank, SSB*, 167 F.3d 667, 672 n.4 (1st Cir. 1999). While the defendant may thus defend against the plaintiff's claim by asserting competing rights arising out of the same transaction and thereby extinguish or reduce any judgment awarded to the plaintiff, recoupment ''does not allow the defendant to pursue damages in excess of the plaintiff's judgment award.'' *Nevada State Bank v. Jamison Partnership*, 106 Nev. 792, 797 n.2, 801 P.2d 1377, 1381 n.2 (1990). Thus, by its very nature and regardless of whether the same facts could constitute a separate claim for damages, recoupment seeks to challenge the foundation of the plaintiff's claim and, consequently, we recognize recoupment as an affirmative defense not barred by FIRREA. *Jamison Partnership*, 106 Nev. at 797, 801 P.2d at 1381; *Bolduc*, 167 F.3d at 672; *F.D.I.C. v. Modular Homes, Inc.*, 859 F. Supp. 117, 123 (D.N.J. 1994). Here, based on his allegations, Schettler may be able to demonstrate that he is entitled to recoup against any amount awarded RalRon on its claims, up to the amount awarded.[8]

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see also Williams v. Cottonwood Cove Dev. Co., 96 Nev. 857, 860, 619 P.2d 1219, 1221 (1980) (pleadings ''must give fair notice of the nature and basis'' for the defense). Fair notice was given because it was specifically raised on reconsideration, which is a part of the issues on appeal. Accordingly, we will not treat recoupment as waived.

[8]RalRon argues that even if FIRREA does not bar the district court from considering Schettler's disputed affirmative defense, RalRon is immune from Schettler's defenses because it is a holder in due course under Nevada law and federal common law. We reject this argument. RalRon cannot be a holder in due course pursuant to state law. *See St. James v. Diversified Commercial Fin.*, 102 Nev. 23, 25, 714 P.2d 179, 180 (1986) (citing NRS 104.3302(1)) (outlining the requirements for a holder in due course). ''A holder is not a holder in due course when the note is purchased after maturity and while in default, unless the shelter rule applies.'' 11 Am. Jur. 2d *Bills and Notes* § 271 (2009) (footnotes omitted). Here, Schettler was in default when RalRon purchased the loan documents. Additionally, the shelter rule, which gives a transferee of an instrument the rights of a holder in due course, NRS 104.3203(2), does not apply because the FDIC as receiver is not a holder in due course. *See Cadle Co., Inc. v. Wallach Concrete, Inc.*, 897 P.2d 1104, 1107 (N.M. 1995). RalRon is also not a holder in due course under any federal law. While circuit courts are split on the issue, *F.D.I.C. v. Deglau*, 207 F.3d 153, 170-71 (3d

[Headnote 12]

Because Schettler's affirmative defense raised unresolved questions of material fact, and because affirmative defenses are not barred by FIRREA, the district court erred in granting summary judgment in favor of RalRon on its breach of contract and breach of personal guaranty claims. *See generally First Interstate Bank v. Shields*, 102 Nev. 616, 619-20, 730 P.2d 429, 431 (1986) (''As a general rule, the payment or other satisfaction or extinguishment of the principal debt or obligation by the principal or by anyone for him discharges the guarantor.'') Accordingly, we reverse the district court's summary judgment, and we remand this matter to the district court for further proceedings.

DOUGLAS and PARRAGUIRRE, JJ., concur.

Cir. 2000), ''most federal and state courts agree that the United States Supreme Court has recently rejected supplementing federal statutory law with federal common law to determine whether federal or state law governs holder-in-due-course status.'' *Cadle Co. v. Patoine*, 772 A.2d 544, 547 (Vt. 2001). At least some courts reaching this conclusion have relied on language from the United States Supreme Court's opinion in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994). ''The receiver is required to 'work out its claims under state law, except where some provision in . . . FIRREA provides otherwise. To create additional ''federal common-law'' exceptions is not to ''supplement'' this scheme, but to alter it.' '' *Bisson v. Eck*, 720 N.E.2d 784, 789 (Mass. 1999) (second alteration in original) (quoting *O'Melveny*, 512 U.S. at 87). We conclude that this rationale is persuasive and that, accordingly, RalRon is not entitled to federal holder-in-due-course status.

CLUB VISTA FINANCIAL SERVICES, L.L.C., A NEVADA LIMITED LIABILITY COMPANY; THARALDSON MOTELS II, INC., A NORTH DAKOTA CORPORATION; AND GARY D. THARALDSON, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE, RESPONDENTS, AND SCOTT FINANCIAL CORPORATION, A NORTH DAKOTA CORPORATION; BRADLEY J. SCOTT; BANK OF OKLAHOMA, N.A., A NATIONAL BANK; GEMSTONE DEVELOPMENT WEST, INC., A NEVADA CORPORATION; AND ASPHALT PRODUCTS CORP. DBA APCO CONSTRUCTION, A NEVADA CORPORATION, REAL PARTIES IN INTEREST.

No. 57641

May 17, 2012 276 P.3d 246

Original petition for a writ of mandamus or prohibition challenging a district court order permitting real parties in interest to depose petitioners' trial attorney.

After the district court denied loan guarantor's motion for protective order in guarantor's action against lender for fraud and breach of fiduciary duty and permitted lender to depose guarantor's former attorney as to factual matters supporting allegations in guarantor's complaint, guarantor petitioned for writ of mandamus or prohibition. The supreme court, CHERRY, C.J., as a matter of first impression, held that a party seeking to take the deposition of an opposing party's counsel has the burden of proving that no other means exist to obtain the information than to depose opposing counsel, the information sought is relevant and nonprivileged, and the information is crucial to the preparation of the case.

Petition granted in part.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *Marquis Aurbach Coffing* and *Micah S. Echols, Terry A. Coffing*, and *David T. Duncan*, Las Vegas, for Petitioners.

Kemp, Jones & Coulthard, LLP, and *J. Randall Jones, Mark M. Jones*, and *Jennifer C. Dorsey*, Las Vegas, for Real Parties in Interest Scott Financial Corporation and Bradley J. Scott.

Howard & Howard and *Wade B. Gochnour, Gwen Rutar Mullins*, and *Robert L. Rosenthal*, Las Vegas, for Real Party in Interest Asphalt Products Corporation.

Lewis & Roca, LLP, and *Von S. Heinz*, Las Vegas; *Frederic Dorwart Lawyers* and *John D. Clayman* and *Piper Turner*, Tulsa, Oklahoma, for Real Party in Interest Bank of Oklahoma, N.A.

Patrick K. Smith, Las Vegas, for Real Party in Interest Gemstone Development West, Inc.

1. MANDAMUS; PROHIBITION.
   Prohibition is a more appropriate remedy for the prevention of improper discovery than mandamus.
2. MANDAMUS; PROHIBITION.
   The decision to issue a writ of mandamus or prohibition lies within the discretion of the supreme court.
3. MANDAMUS; PROHIBITION.
   Petitioners for writ of mandamus or prohibition bear the burden to demonstrate that the supreme court's intervention by way of extraordinary relief is warranted.
4. APPEAL AND ERROR; PRETRIAL PROCEDURE.
   Discovery matters are within the district court's sound discretion, and the supreme court will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion.
5. MANDAMUS; PROHIBITION.
   The supreme court generally will not exercise its discretion to review discovery orders through petitions for extraordinary relief, unless the challenged discovery order is one that is likely to cause irreparable harm, issued without regard to the relevance of the information sought, or requires disclosure of privileged information.
6. PRETRIAL PROCEDURE.
   A party seeking to take the deposition of an opposing party's counsel has the burden of proving that: (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.

Before the Court EN BANC.[1]

OPINION

By the Court, CHERRY, C.J.:

In this original writ petition, we address whether, and under what circumstances, a party to a lawsuit may depose an opposing party's former attorney. In considering this issue, we adopt the framework espoused by the Eighth Circuit Court of Appeals in *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986). Under the *Shelton* analysis, the party seeking to depose opposing counsel must demonstrate that the information sought cannot be obtained by other means, is relevant and nonprivileged, and is crucial to the preparation of the case. *Id.* at 1327. Because the district court did not analyze these factors, we grant the writ petition in part and direct the district court to evaluate whether, applying the *Shelton* factors, real parties in interest may depose petitioners' former trial attorney.

[1]THE HONORABLE RON PARRAGUIRRE, Justice, did not participate in the decision of this matter.

FACTS AND PROCEDURAL HISTORY

Petitioners Club Vista Financial Services, L.L.C.; Gary Tharaldson; and Tharaldson Motels II, Inc. (collectively, Club Vista), entered into a real estate development project known as Manhattan West with real parties in interest Scott Financial Corporation; Bradley J. Scott; Bank of Oklahoma, N.A.; Gemstone Development West, Inc.; and Asphalt Products Corporation d.b.a. APCO Construction (collectively, Scott Financial). When a multimillion dollar loan guaranteed by Tharaldson and Tharaldson Motels II went into default, Club Vista hired Arizona attorneys K. Layne Morrill and Martin A. Aronson to determine whether legal action was warranted. Based on their investigation, Morrill and Aronson filed, through local counsel, an action in the Nevada district court on behalf of Club Vista against Scott Financial, alleging that Scott Financial, as lenders on the loan, had failed to ensure that certain pre-funding conditions were satisfied before advancing money on the loan. The complaint included claims of, among other things, fraud, constructive fraud, and breach of fiduciary duty. In their NRCP 16.1 initial disclosures, Club Vista identified attorney Morrill as a person who ''may have discoverable information related to dealings between Scott Financial and Tharaldson and related companies.''

During discovery, Scott Financial deposed Tharaldson, who testified that, with a few exceptions, he did not have any personal knowledge of the factual allegations underlying the complaint, nor did he know of anyone, other than his attorneys, who might have such information. Tharaldson further testified that he, Ryan Kucker, and Kyle Newman, both employed by Tharaldson, were the primary witnesses on Club Vista's side of the transaction who would have personal knowledge related to the Manhattan West project. In their depositions, Kucker and Newman also denied having personal knowledge of factual allegations underlying the complaint.

Following the depositions of Tharaldson, Kucker, and Newman, Scott Financial informed attorney Morrill that it intended to take his deposition as to the factual basis for the allegations in the complaint. In furtherance of this intention, Scott Financial obtained a deposition subpoena in Arizona for Morrill.[2] Morrill then filed, also in Arizona, a motion to quash the subpoena or for a protective order preventing Scott Financial from taking his deposition. The Arizona court granted the motion but expressly stated that it

[2]Scott Financial also obtained a deposition subpoena for Morrill's co-counsel, Aronson, but it has since stated that it will not seek to depose Aronson.

did not intend to suggest how the Nevada discovery master should rule on any issues presented to him related to the proposed deposition.[3] Shortly before the Arizona court issued its decision, Club Vista filed a supplementary NRCP 16.1 disclosure, stating that it did not believe that Morrill had any discoverable information relevant to the suit.

In addition to the Arizona motion to quash, Morrill filed a motion in the Nevada district court for a protective order to preclude Scott Financial from taking his deposition. The discovery master recommended that the district court enter an order denying the motion for a protective order and permitting Scott Financial to depose Morrill as to factual matters supporting the allegations in the complaint. The discovery master noted that both parties had cited *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), in discussing whether an opposing party's attorney could be deposed in preparation for trial. While the discovery master recognized that *Shelton* permits a party to depose the opposing party's attorney only when relevant, nonprivileged, and crucial information cannot be obtained by means other than deposing the attorney, the master did not analyze the application of these factors to this case, except to state that Tharaldson had admitted that his attorneys were the only parties who were familiar with the facts underlying the complaint. Morrill filed a timely objection to the discovery master's recommendation.

On review of the matter, the district court, without citing *Shelton* or discussing the factors identified in that opinion, upheld the discovery master's recommendations, noting that the attorneys would be able to object to questions they believed impinged on a privilege, a record would be made such that the propriety of any specific question could be sufficiently addressed by the court, and the attorney-client and work-product privileges would not necessarily bar all questions that Scott Financial would ask. Additionally, the court concluded that the discovery master's recommendation was appropriate in light of Scott Financial's assertion that it only intended to ask questions about factual issues.

This petition for writ of mandamus or prohibition followed.[4] During oral argument before this court, Club Vista unequivocally stated that it would not call Morrill as a witness at trial. Moreover, while this writ petition was pending, other counsel was substituted for Morrill, and he is no longer an attorney of record for Club Vista.

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[3]Due to the complex nature of the case, the parties stipulated to the appointment of a discovery master to resolve discovery issues.

[4]This court stayed the proposed deposition pending resolution of the issues presented in this petition.

DISCUSSION

This original proceeding requires us to determine whether, and under what circumstances, a district court may allow a party to depose an opposing party's attorney. Club Vista contends that it is entitled to relief from the district court's order authorizing the deposition of Morrill because deposing an opposing party's attorney is a drastic measure and is inappropriate when the attorney lacked any involvement in the underlying dispute. Club Vista urges this court to adopt a stringent test for permitting attorney depositions, whereas Scott Financial advocates a more flexible approach.[5]

Writ relief

[Headnotes 1-3]

A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court.[6] NRS 34.320. Writ relief is generally not available if the petitioner has ''a plain, speedy and adequate remedy in the ordinary course of law.'' NRS 34.330; *see International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Additionally, the decision to issue writ relief lies within the discretion of this court. *Smith v. District Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Petitioners bear the burden to demonstrate that our intervention by way of extraordinary relief is warranted. *Pan v. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

[Headnotes 4, 5]

Discovery matters are within the district court's sound discretion, and we will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion. *Matter of Adoption of Minor Child*, 118 Nev. 962, 968, 60 P.3d 485, 489 (2002). Thus, we generally will not exercise our discretion to review discovery orders through petitions for extraordinary relief, unless the challenged discovery order is one that is likely to cause irreparable harm, such as a blanket discovery order, issued without regard to the relevance of the information sought, or an order that requires disclosure of privileged information. *See Hetter v. District Court*, 110 Nev. 513, 515, 874 P.2d 762, 763 (1994).

Here, a writ of prohibition is the appropriate avenue for relief because Club Vista does not have a plain, speedy, and adequate

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[5]As an initial matter, we conclude that the district court was not required to give preclusive effect to the Arizona court's decision to quash the deposition subpoena in light of that court's express qualification that it did not intend its order to influence the discovery master's resolution of the deposition issue.

[6]Because ''prohibition is a more appropriate remedy for the prevention of improper discovery than mandamus,'' *Wardleigh v. District Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995), we deny Club Vista's alternative request for mandamus relief.

remedy at law. If, as Club Vista asserts, the discovery permitted by the district court's order is inappropriate, a later appeal would not effectively remedy any improper disclosure of information. *Wardleigh v. District Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995) (''If improper discovery were allowed, the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal.''). Accordingly, we now turn to whether a writ of prohibition should issue in this case.

Attorney depositions

Nevada's discovery rules ''grant broad powers to litigants promoting and expediting the trial of civil matters by allowing those litigants an adequate means of discovery during the period of trial preparation.'' *Maheu v. District Court*, 88 Nev. 26, 42, 493 P.2d 709, 719 (1972). NRCP 26(a) permits discovery of information in a variety of methods including ''depositions upon oral examination.'' Such depositions are governed by NRCP 30, which allows a party to depose ''any person'' by oral examination. NRCP 30(a)(1). Thus, the rule does not prohibit the taking of opposing counsel's deposition. Nevertheless, the district court may, based on good cause shown, bar or limit discovery to prevent, among other things, an undue burden. NRCP 26(c). With the foregoing principles of depositional discovery in mind, we examine the policies behind limiting the practice of taking the deposition of an opposing party's attorney and whether these depositions create an undue burden.

Forcing an opposing party's trial counsel to personally participate in trial as a witness ''has long been discouraged and recognized as disrupting the adversarial nature of our judicial system.'' *Shelton*, 805 F.2d at 1327 (citation omitted). In particular, requiring attorneys to participate in such a manner may increase the time and costs of litigation, create delays to resolve work-product and attorney-client objections, distract the attorney from representation of the client, and prevent clients from openly communicating with their attorneys. *Id.* Permitting the unbridled deposition of a party's attorney could further command delays to resolve collateral issues raised by the attorney's testimony. *See Wardleigh*, 111 Nev. at 359, 891 P.2d at 1189 (courts must protect an attorney's work product as ''mental impressions, conclusions, opinions, and legal theories of counsel concerning . . . litigation are not discoverable under any circumstances''). Additionally, ''such depositions could provide a back-door method for attorneys to glean privileged information about an opponent's litigation strategy from the opposing attorney's awareness of various documents.'' *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 70 (2d Cir. 2003); *see also McMurry v. Eckert*, 833 S.W.2d 828, 830-31 (Ky. 1992) (explaining that the

potential for harm created by attorney depositions is too great to permit them to be routinely performed); *Kerr v. Able Sanitary*, 684 A.2d 961, 967 (N.J. Super. Ct. App. Div. 1996) (concluding that the request to depose a party's attorney creates a rebuttable presumption of good cause for issuing a protective order); *but see Munn v. Bristol Bay Housing Authority*, 777 P.2d 188, 196 (Alaska 1989) (asserting that ''an attorney is no more entitled to withhold information than any other potential witness, and may be required to testify at a deposition or trial as to material, nonprivileged matters'').

Based on the aforesaid apprehensions of placing counsel under the microscope of interrogation, courts across this country ''have disfavored the practice of taking the deposition of a party's attorney.'' *Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 (5th Cir. 1999); *see, e.g.*, *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628 (6th Cir. 2002); *Boughton v. Cotter Corp.*, 65 F.3d 823, 830-31 (10th Cir. 1995). While we have not encountered rampant attorney depositions in Nevada, we are wholeheartedly concerned with this vehicle of discovery and its imaginable ability to create an undue burden. However, opposing counsel should not be absolutely immune from being deposed. Therefore, we conclude that such depositions should only be permitted under exceptionally limited circumstances.

[Headnote 6]

To address the difficulties presented by attorney depositions, the Eighth Circuit Court of Appeals has developed a stringent three-factor test under which the party seeking to take the deposition of an opposing party's counsel has the burden of proving that ''(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.'' *Shelton*, 805 F.2d at 1327 (citations omitted). We agree with the *Shelton* court that, in the absence of these conditions, a party should not be permitted to depose an opposing party's attorney, and thus, we adopt this three-factor test.[7] In evaluating these three factors, the district court should consider whether the attorney is a percipient witness[8] to the facts giving rise to the complaint. *See Kerr*, 684 A.2d at 967 (including, among factors to be considered in determining whether to permit an attorney deposition, the ''rel-

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[7]In light of the substantial public policy concerns implicated by attorney depositions, we decline to adopt the more flexible approach urged by Scott Financial and discussed by the Second Circuit Court of Appeals in *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65 (2d Cir. 2003).

[8]A percipient witness is ''[a] witness who has perceived the things about which he or she testifies.'' *Black's Law Dictionary* 1741 (9th ed. 2009). A percipient witness is also known as an eyewitness or ''[o]ne who personally observes an event.'' *Id.* at 667.

ative quality of the information purportedly in the attorney's knowledge''). By establishing this heightened standard when a party is attempting to depose opposing counsel, we advise litigants to resort to alternative discovery methods and discourage endeavors to seek confidential and privileged information. When the facts and circumstances are so remarkable as to allow a party to depose the opposing party's counsel, the district court should provide specific limiting instructions to ensure that the parties avoid improper disclosure of protected information.

In the instant case, the discovery master mentioned the *Shelton* factors but did not analyze their application to this situation. Further, the district court adopted the master's recommendations without any discussion of whether the *Shelton* factors were satisfied. Accordingly, as the district court did not consider pertinent factors for resolving the motion for a protective order, we grant the writ in part and direct the district court to reconsider the motion in light of the *Shelton* factors and this opinion. In doing so, the district court should consider whether Morrill has any relevant, discoverable information and the impact of Club Vista's definitive assertion at oral argument that Morrill has been withdrawn as a potential witness for trial.[9] To the extent that the instant petition seeks an order compelling the district court to issue a protective order preventing the proposed deposition, we deny it. Instead, we take no position on the proper resolution of the motion for a protective order, as it is for the district court to evaluate the motion under the proper standard, as discussed in this opinion.

CONCLUSION

For the reasons discussed herein, we grant the petition in part and direct the clerk of this court to issue a writ of prohibition directing the district court to evaluate the underlying facts and circumstances of the request for a protective order in light of the three-factor test set forth in *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986), and Club Vista's assertion that Morrill has been withdrawn as a witness.[10]

DOUGLAS, SAITTA, GIBBONS, PICKERING, and HARDESTY, JJ., concur.

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[9]We recognize also that Morrill is no longer Club Vista's counsel in the district court action. While Morrill's substitution alleviates some of the concerns generally raised by deposing a party's current trial counsel, in this case, the district court should nonetheless apply the standards discussed here because Morrill was responsible for the filing of the complaint in this action and was Club Vista's trial counsel for a significant portion of the proceedings below.

[10]In light of this opinion, we vacate the stay ordered by this court on March 3, 2011.

IN RE: NEVADA STATE ENGINEER RULING NO. 5823.

CHURCHILL COUNTY, NEVADA, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA; AND PYRAMID LAKE PAIUTE TRIBE, APPELLANTS, *v.* STATE ENGINEER, THE STATE OF NEVADA, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES; ASPEN CREEK, LLC; DAYTON VALLEY INVESTORS, LLC; LYON COUNTY; STANTON PARK DEVELOPMENT, INC.; CARSON TAHOE REGIONAL HEALTHCARE; R & B LAND INVESTMENTS; DENNIS SMITH; AND MARCIA BENNETT SMITH, RESPONDENTS.

No. 52963

May 31, 2012 277 P.3d 449

Appeal from a district court order dismissing a petition for judicial review of the State Engineer's ruling in a water rights action. Third (now Tenth) Judicial District Court, Churchill County; David A. Huff, Judge.

Churchill County and Native American tribe filed appeals protesting the decision of State Engineer granting applications for new groundwater appropriations from a basin lying wholly within Lyon County. The district court dismissed appeals for lack of subject matter jurisdiction. County and tribe appealed. The supreme court, PICKERING, J., held that general forum provision does not limit jurisdiction over an appeal from a decision of State Engineer to the court of the county where the applicant's water rights lie, but contemplates more than one permissible forum, depending on the location, nature, and origin of the interests, including those of protesters, assertedly affected.

Vacated and remanded.

Arthur E. Mallory, District Attorney, and *Craig B. Mingay*, Deputy District Attorney, Churchill County, for Appellant Churchill County.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Don Springmeyer* and *Christopher W. Mixson*, Las Vegas, for Appellant Pyramid Lake Paiute Tribe.

Allison, MacKenzie, Pavlakis, Wright & Fagan, Ltd., and *Karen A. Peterson*, Carson City, for Respondent Carson Tahoe Regional Healthcare.

Catherine Cortez Masto, Attorney General, and *Bryan L. Stockton*, Deputy Attorney General, Carson City, for Respondent Nevada State Engineer.

George N. Benesch, Reno, for Respondent Lyon County.

Holland & Hart LLP and *Alex J. Flangas*, Reno, for Respondent R & B Land Investments.

J.M. Clouser & Associates, Ltd., and *Justin M. Clouser*, Minden, for Respondents Dennis Smith and Marcia Bennett Smith.

Law Offices of John P. Schlegelmilch, Ltd., and *Sandra-Mae Pickens*, Yerington; *Thorndal Armstrong Delk Balkenbush & Eisinger* and *Brent T. Kolvet*, Reno, for Respondent Stanton Park Development, Inc.

Robertson & Benevento and *G. David Robertson* and *Jarrad C. Miller*, Reno, for Respondents Aspen Creek, LLC; and Dayton Valley Investors, LLC.

Brownstein Hyatt Farber Schreck, LLP, and *Gary M. Kvistad* and *Bradley J. Herrema*, Las Vegas; *Brownstein Hyatt Farber Schreck, LLP*, and *Michael A. Gheleta* and *Geoffrey M. Williamson*, Denver, Colorado, for Amicus Curiae Town of Minden, Nevada.

1. Appeal and Error.
   When decided on pleadings alone, subject matter jurisdiction presents a question of law subject to de novo review.
2. Appeal and Error.
   Questions of statutory interpretation receive de novo review.
3. Water Law.
   Presumption of correctness accorded to a decision of the State Engineer does not extend to purely legal questions, such as the construction of a statute, as to which the reviewing court may undertake independent review. NRS 533.450(10).
4. Water Law.
   The supreme court recognizes the State Engineer's expertise and looks to his or her interpretation of a Nevada water law statute as persuasive, if not mandatory, authority; put another way, while the State Engineer's interpretation of a statute may be persuasive, it is not controlling. NRS 533.450.
5. Water Law.
   The phrase ''any person,'' as used in statute granting a right to judicial review to any person feeling aggrieved by any order or decision of State Engineer affecting the person's interests, signifies inclusiveness, not limitation, and extends the right of judicial review to applicants and protesters alike. NRS 533.450(1).
6. Statutes.
   ''Must'' is mandatory, as distinguished from the permissive ''may.''
7. Water Law.
   Forum provision, generally requiring that an appeal by a person feeling aggrieved by an order or decision of State Engineer affecting the person's interest must be initiated in the proper court of the county in which the ''matters affected'' or a portion thereof are situated, does not limit ju-

risdiction over such an appeal to the court of the county where the applicant's water rights lie, but contemplates more than one permissible forum, depending on the location, nature, and origin of the interests, including those of protesters, assertedly affected. NRS 533.450(1).

8. WATER LAW.

To the extent an order or decision of the State Engineer affects a protester's senior, federally decreed rights, the decree court has limited jurisdiction over protester's appeal to assess and, if appropriate, direct the State Engineer to correct the adverse effect on the senior, federally decreed rights; to the extent an appeal asserts that state-decreed or state-permitted rights are adversely affected, jurisdiction lies in the proper court of the county in which the matters affected or a portion thereof are situated. NRS 533.450(1).

9. COURTS.

While the interpretation by the United States Court of Appeals for the Ninth Circuit of a Nevada statute on a matter of state law does not constitute mandatory precedent, the state supreme court nonetheless respects such authority as persuasive.

10. WATER LAW.

While valid and important, general principle of water law that a single court should have exclusive jurisdiction over an interrelated system of water rights is not an inviolable rule.

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

NRS 533.450(1) affords judicial review ''in the nature of an appeal'' to ''[a]ny person feeling aggrieved by any order or decision of the State [Water] Engineer . . . affecting the person's interests.'' The appeal ''must be initiated in the proper court of the county in which the matters affected or a portion thereof are situated.'' *Id.* In this case, we consider what the statute means by ''matters affected.'' The district court held that the phrase refers to the point of diversion of the applicants' existing or proposed water rights, nobody else's. It further held that filing for review in an improper county does not just misplace venue, a defect that may be cured or waived, but defeats subject matter jurisdiction, requiring dismissal. Thus, since the protesters filed their appeals in Churchill County, where their rights or interests allegedly would be affected, as opposed to Lyon County, where the applicants' groundwater appropriations lie, the district court summarily dismissed. By then, NRS 533.450(1)'s 30-day limit on seeking judicial review had passed.

We conclude that the district court read the statute too restrictively. We therefore vacate the jurisdictional dismissal and remand for further proceedings consistent with this opinion.

I.

A.

This case concerns State Engineer Ruling 5823, allocating groundwater rights in the Dayton Valley Hydrographic Basin (the Basin). Most of the applications considered in Ruling 5823 asked to change the point of diversion, place, and manner of use of existing groundwater appropriations. However, two were for new groundwater appropriations. The Basin lies wholly within Lyon County.

Appellants Churchill County and the Pyramid Lake Paiute Tribe (the Tribe) protested the applications before the State Engineer. They maintain that the Basin is ''severely over-appropriated.'' Because the Basin's groundwater is hydrologically connected to the surface waters of the Carson River, which flows into the Lahontan Reservoir, they argued to the State Engineer that approving the applications in Lyon County would deplete these waters, in which they have an interest, in neighboring Churchill County.

Churchill County holds decreed surface water rights in the Carson River, but the Tribe does not. Nonetheless, the Tribe reasons that the applications considered in Ruling 5823 affect its interests because depleting the Carson River surface water will decrease inflow into the Lahontan Reservoir. In turn, Newlands Reclamation Project senior water rights holders would be entitled to divert Truckee River surface water to compensate for insufficient flows from the Carson River. This water diversion would decrease the Truckee River's flow into Pyramid Lake, thus affecting the Tribe's interests.

In Ruling 5823, the State Engineer rejected both Churchill County's and the Tribe's protests and granted all pending applications.

B.

Churchill County and the Tribe appealed, invoking NRS 533.450(1), which reads in pertinent part as follows:

> Any person feeling aggrieved by any order or decision of the State Engineer, acting in person or through the assistants of the State Engineer or the water commissioner, affecting the person's interests, when the order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, or NRS 533.481, 534.193, 535.200 or 536.200, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which must be initiated in the proper court of the county in which the matters affected or a portion

> thereof are situated, but on stream systems where a decree of court has been entered, the action must be initiated in the court that entered the decree.

Deeming themselves ''aggrieved'' and the ''matters affected or a portion thereof'' to be situate in Churchill County, the County and the Tribe filed their appeals in the Third Judicial District Court in Churchill County. In addition, the Tribe filed a separate appeal in the federal court that had issued the decree governing use of Carson River water, *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 879-81 (D. Nev. 1980), *aff'd as modified*, 697 F.2d 851 (9th Cir. 1983) (the *Alpine* decree), relying on the clause of exception in NRS 533.450(1) (''but on stream systems where a decree of court has been entered, the action must be initiated in the court that entered the decree'').[1]

The State Engineer responded to the Third Judicial District Court appeals with a demand to change venue from Churchill to Lyon County. At the time, the Third Judicial District comprised both Churchill and Lyon Counties. In practical terms, therefore, all the State Engineer sought was an intradistrict change of venue, from one county court to another, within the same judicial district.[2] Respondents Aspen Creek, LLC, and Dayton Valley Investors, LLC (collectively, Aspen Creek), went further, filing a motion to dismiss that challenged subject matter jurisdiction. Although some of the other respondents joined Aspen Creek's motion to dismiss, the State Engineer did not, standing on his venue challenge.

The motions to change venue and to dismiss both argued that, under NRS 533.450(1), ''the proper court of the county in which the matters affected or a portion thereof are situated'' was the Third Judicial District Court in Lyon County, because that is where the applicants' water rights are or would be located. Not surprisingly, Churchill County and the Tribe disagreed. In their view, NRS 533.450(1) by its terms (''or a portion thereof . . .'') contemplates more than one possible forum and, in using the phrase ''matters affected,'' refers not just to an applicant's interests but to a protester's as well. Thus, the district courts in either Churchill County or Lyon County could entertain their appeals.

Similar arguments were made to the *Alpine* decree court on motions to dismiss the Tribe's parallel federal appeal. The *Alpine* decree court ruled before the district court in this case did. *United States v. Alpine Land & Reservoir Co.*, Case Subfile No.

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[1]The Tribe's Churchill County petition describes its federal *Alpine* decree court petition as ''primary'' to its ''secondary'' state court petition.

[2]Effective January 1, 2012, Churchill County was removed from the Third Judicial District to become the newly created Tenth Judicial District. The Third and Tenth Judicial Districts now are single-county districts, encompassing Lyon and Churchill Counties, respectively. 2011 Nev. Stat., ch. 316, § 1, at 1772-73.

3:73-cv-00203-LDG, Equity No. 3:73-cv-00183-LDG (D. Nev. July 3, 2008) (*Alpine* 2008 order). It accepted arguendo (as do we) that Ruling 5823 affected the Tribe's rights in the Truckee River, as adjudicated in *United States v. Orr Water Ditch Co.*, Equity No. A-3 (D. Nev. 1944) (the *Orr Ditch* decree), due to the alleged impact on the surface waters of the Carson River outlined above. Nonetheless, the *Alpine* decree court rejected the Tribe's argument that this qualified its appeal under the clause in NRS 533.450(1) providing, ''but on stream systems where a decree of court has been entered, the action must be initiated in the court that entered the decree.'' According to the *Alpine* decree court, alleging that a state engineer's ruling affects federally decreed water rights does not thereby ''confer jurisdiction'' on the decree court. *Alpine* 2008 Order, slip op. at 3. ''Rather,'' the court continued, NRS 533.450(1) reposes exclusive jurisdiction in the court where the applicant's actual or proposed water rights are located, meaning in the context of Ruling 5823 ''that such jurisdiction is in the proper court in Lyon County, as that is the county in which the Dayton Valley Hydrographic Basin is located.'' *Id.* Accordingly, the *Alpine* decree court dismissed the Tribe's appeal of Ruling 5823.

The district court in this case accepted Aspen Creek's invitation to take judicial notice of the *Alpine* 2008 order. It ''agree[d] with the *Alpine* court that it is the location of the water rights of the applicant that determines which court has jurisdiction to hear an appeal from a State Engineer's decision.'' Given the admitted fact that ''[t]he rights granted or altered in State Engineer Ruling 5823 are located in Lyon County,'' it concluded that it did not have ''subject matter jurisdiction over th[e] appeal.'' Lacking subject matter jurisdiction, the district court deemed itself powerless to order a change of venue, and dismissed. It did so based on the pleadings and the State Engineer's written ruling, without considering the administrative record, which had yet to be filed when its order was entered.

From this order of dismissal, Churchill County and the Tribe have appealed.

C.

After the principal briefs in this appeal were filed, the Ninth Circuit Court of Appeals vacated the *Alpine* 2008 order. *United States v. Alpine Land & Reservoir Co.*, 385 F. App'x 770 (9th Cir. 2010). It did so based on *United States v. Orr Water Ditch Co.*, 600 F.3d 1152 (9th Cir. 2010). The 2010 *Orr Ditch* decision rejects the proposition that the location of the applicant's water rights determines jurisdiction under NRS 533.450(1), at least in cases where the protester's allegedly affected rights are federally decreed; it holds that ''any allocation of groundwater rights by the State Engineer that allegedly diminishes the Tribe's decreed water

rights comes within the clause of [NRS] 533.450(1) that provides for appellate review 'in the court that entered the decree.' '' *Id.* at 1160.[3]

This court requested and received further briefing on the impact on this appeal of the decisions in *Alpine Land & Reservoir Co.*, 385 F. App'x 770, and *United States v. Orr Water Ditch Co.*, 600 F.3d 1152, as well as the federal district court's order on remand from the Ninth Circuit in *United States v. Alpine Land & Reservoir Co.*, 788 F. Supp. 2d 1209 (D. Nev. 2011). *See also United States v. Alpine Land & Reservoir Co.*, Nos. 3-73-cv-00183-LDG, 3:37-cv-00202-LDG, 2011 WL 2470627 (D. Nev. June 17, 2011). We also asked the parties to clarify whether the interests of Churchill County and the Tribe assertedly affected by Ruling 5823 derive from water rights that are decreed, permitted, or a combination of both, a question the parties could not definitively answer given the limited record available.[4]

II.

[Headnotes 1, 2]

The sole issue presented by this appeal concerns subject matter jurisdiction, which the district court determined was lacking based on its reading of NRS 533.450(1), the pleadings, and State Engineer Ruling 5823. When decided on pleadings alone, ''[s]ubject matter jurisdiction [presents] a question of law subject to de novo review.'' *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). ''[Q]uestions of statutory interpretation'' also receive de novo review. *Bigpond v. State*, 128 Nev. 108, 114, 270 P.3d 1244, 1248 (2012).

[Headnotes 3, 4]

A decision of the State Engineer enjoys a presumption of correctness. NRS 533.450(10). The presumption does not extend to

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[3]Of note, the Tribe's appeal to the *Alpine* decree court of Ruling 5823 was not, as in *Orr Ditch*, an appeal to the court that established the decreed water rights of the Tribe allegedly affected by the protested groundwater allocation. *See Alpine Land & Reservoir Co.*, 385 F. App'x at 771 (noting that the Tribe ''relied in its challenge not on any right to Carson River water,'' adjudicated in the *Alpine* decree, ''but on the potential downstream impact of the allocations on the Tribe's decreed rights to the Truckee River,'' adjudicated in the *Orr Ditch* decree). Nonetheless, the Ninth Circuit *Alpine* panel concluded that, ''[c]onsistent with our holding in *Orr*[*Ditch*, 600 F.3d 1152], subject matter jurisdiction exists over the Tribe's appeal from the State Engineer's Ruling 5823 . . . insofar as the allocation of Dayton Valley Hydrographic Basin groundwater rights is plausibly alleged to affect adversely the Tribe's decreed water rights under the Orr Ditch Decree.'' *Id.* at 772.

[4]On motion by a respondent, this court struck the excerpts of the administrative record in appellants' appendix, as the administrative record was never filed with the district court. NRAP 30(g)(1) (''the appendix [must] consist[ ] of true and correct copies of the papers in the district court file'').

''purely legal questions,'' such as ''the construction of a statute,'' as to which ''the reviewing court may undertake independent review.'' *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). Even so, this court recognizes the State Engineer's expertise and looks to his interpretation of a Nevada water law statute as persuasive, if not mandatory, authority. *Id*. at 165-66, 826 P.2d at 950. Put another way, ''[w]hile the State Engineer's interpretation of a statute [may be] persuasive, it is not controlling.'' *Id.*; *accord State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).

A.

Our analysis begins with NRS 533.450(1)'s text. *See* 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47:1, at 274-75 (7th ed. 2007) (''The starting point in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure.'' (footnote omitted)); Oliver Wendell Holmes, *Collected Legal Papers* 207 (New York 1920) (''we do not inquire what the legislature meant; we ask only what the statute means'').

[Headnote 5]

NRS 533.450(1) starts out with an introductory grant clause that gives ''[*a*]*ny person* feeling aggrieved by *any* order or decision of the State Engineer . . . *affecting the person's interests*'' a right to judicial review. (Emphasis added.) The phrase ''any person'' signifies inclusiveness, not limitation. *See Western Surety Company v. ADCO Credit*, 127 Nev. 100, 104, 251 P.3d 714, 716-17 (2011). Read literally, and without more, NRS 533.450(1)'s grant clause thus extends the right of judicial review to applicants and protesters alike. *See Howell v. State Engineer*, 124 Nev. 1222, 1228, 197 P.3d 1044, 1048 (2008) (''so long as the [State Engineer's] decision affects a person's interests that relate to the administration of determined rights, and is a final written determination on the issue, the aggrieved party may properly challenge it through a petition for judicial review'' under NRS 533.450(1)).

[Headnote 6]

Having established a right of judicial review in favor of applicants and protesters alike, the statute continues with its forum clause. This clause specifies that the judicial review proceeding ''must be initiated in the proper court of the county in which the matters affected or a portion thereof are situated.'' NRS 533.450(1). ''Must'' is mandatory, as distinguished from the permissive ''may.'' *Fourchier v. McNeil Const. Co.*, 68 Nev. 109, 122, 227 P.2d 429, 435 (1951). Thus, to obtain judicial review under NRS 533.450(1), a ''person'' aggrieved ''must'' file the

proceeding in ''the proper court of the county in which the matters affected or a portion thereof are situated.'' But this does not signify, as the district court held, that only a single court in a single county will do—much less that the ''matters affected'' must be judged from the perspective of the applicant, not a protester. On the contrary, the phrase ''or a portion thereof'' contemplates multiple potential forums: If ''a portion'' of the ''matters affected'' being situated in the forum county satisfies the statute, so too, should the remainder of the ''matters affected'' qualify the counties in which they are situated. Further, the forum clause's use of ''matters *affected*'' hearkens back to the language in the introductory clause that grants judicial review to ''[a]ny person feeling aggrieved by any order or decision of the State Engineer . . . *affecting* the person's interests.'' NRS 533.450(1) (emphasis added).[5] Accepting that ''[t]he same words used twice in the same [statute] are presumed to have the same meaning,'' 2A Singer & Singer, *Statutes and Statutory Construction*, *supra*, § 46:6, at 249; *see Savage v. Pierson*, 123 Nev. 86, 94, 157 P.3d 697, 702 (2007), the solipsistic view of the respondents that ''matters affected'' only refers to their interests, not those of one or more protesters, is unreasonable, given that the grant clause in the same sentence of the same statute gives ''any person'' a right of judicial review of ''any order or decision of the State Engineer . . . *affecting* the person's interests.''

NRS 533.450(1) continues with a clause of exception: ''but on stream systems where a decree of court has been entered, the action must be initiated in the court that entered the decree.'' The statute's introductory grant and forum clauses have been in place since 1915. 1915 Nev. Stat., ch. 253, § 13, at 384. The clause of exception was added in 1951. 1951 Nev. Stat., ch. 110, § 11, at 140. The clause of exception reinforces the conclusion that NRS 533.450(1) contemplates more than one possible forum—the decree court and other non-decree courts that otherwise, without this clause, could potentially hear the appeal.

[Headnote 7]

Nothing in NRS 533.450(1)'s text, in short, vests exclusive jurisdiction in the court of the county where all or part of the applicant's water rights lie (unless perhaps the clause of exception ap-

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[5]The Legislature knew how to limit review to the county or counties where the applicant's water rights lie, as it had done so in an earlier water law. *Cf.* Compiled Laws of Nevada § 366, at 81 (Cutting 1900) (providing that ''an applicant feeling himself aggrieved by any endorsement made by the Board of Water Commissioners . . . may . . . take an appeal therefrom to the District Court of the county in which is situated the point of diversion of the proposed appropriation''). This language was not used in the 1913 water law, 1913 Nev. Stat., ch. 140, § 75, at 216, as amended in 1915, 1915 Nev. Stat., ch. 253, § 13, at 384, in the section that ultimately became NRS 533.450(1).

plies to the applicant's rights, which isn't suggested here). Instead, the statute's wording plainly contemplates more than one permissible forum, depending on the location, nature, and origin of the interests assertedly affected.

B.

Relying on the later-vacated order of the *Alpine* decree court, *Alpine* 2008 order, slip op. at 3, the district court concluded that NRS 533.450(1) is ambiguous and that the result produced by a literal reading of NRS 533.450(1) was unreasonable. In reaching this conclusion, the district court, like the *Alpine* decree court, relied primarily on the final clause of exception that was added to NRS 533.450(1) in 1951.[6] It did so even though its jurisdiction was not invoked on the basis that it was a decree court but, rather, under the general forum clause in NRS 533.450(1).

In the district court's words, ''[t]he Legislature clearly intended [the clause of exception in] NRS 533.450(1) to confer continuing and exclusive jurisdiction of State Engineer decisions that 'affect' water rights on decreed stream systems on the one court that entered the decree.'' Otherwise, ''the interests claimed to be affected by one decision could be water rights on two different stream systems for which different decrees of court have already been entered by different courts.'' From this, the district court concluded that, ''[i]n order to accomplish the intended exclusive jurisdiction over appeals from decisions deciding water rights on st[r]eam systems, it is necessary to define the 'matters affected' by a State Engineer[']s decision as the water rights of the applicant,'' in both decree-court and non-decree-court cases.

But limiting jurisdiction under NRS 533.450(1) to the court of the county where the applicant's water rights lie creates its own problems with multiple potential forums and creates an even more profound conflict between a decree court's ongoing jurisdiction and a second court's assumption of such jurisdiction—a conflict that the clause of exception in NRS 533.450(1) seems designed to mitigate, to the extent possible. The Ninth Circuit's recent *Orr Ditch* decision, 600 F.3d at 1154, 1159-61, illustrates the problems perfectly.

[Headnote 8]

As the 2010 *Orr Ditch* decision recognizes, federal ''subject matter jurisdiction over appeals from decisions of the State Engi-

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[6]The district court relied on the forum clause's reference to ''the proper court of the county'' to establish ambiguity as to whether NRS 533.450(1) meant to establish a single court with exclusive jurisdiction or multiple potential forums. We interpret the reference to ''the proper court'' as signifying venue, not jurisdictional limitations. *See infra* § II.D.

neer is an odd amalgam,'' a '' 'highly extraordinary,' '' ''unique jurisdictional arrangement.'' *Id.* at 1159 (quoting *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1219 n.2 (9th Cir. 1989)). In appeals of decisions affecting federally decreed rights, jurisdiction rests not only on NRS 533.450(1), but also ''on the ability of a court of equity to enforce and administer its decrees.'' *Id.*; *see State Engineer of NV v. South Fork Band of Te-Moak*, 339 F.3d 804, 813-14 (9th Cir. 2003) (applying the doctrine of prior exclusive jurisdiction to affirm the trial court's abstention ruling in a federal suit to enforce Sixth Judicial District Court Humboldt Decree rights). To the extent an order or decision of the State Engineer affects a protester's senior, federally decreed rights, the decree court has jurisdiction over the appeal. *Orr Ditch*, 600 F.3d at 1160. Such jurisdiction is limited, however, to assessing and, if appropriate, directing the State Engineer to correct the adverse effect on the senior, federally decreed rights. *Id.* To the extent an appeal asserts that state-decreed or state-permitted rights are adversely affected, jurisdiction lies in the ''proper court of the county in which the matters affected or a portion thereof are situated.'' NRS 533.450(1); *see Orr Ditch*, 600 F.3d at 1160.

[Headnote 9]

Orr Ditch focused on the jurisdiction of a federal decree court, pursuant to the clause of exception in NRS 533.450(1). However, its holding that a protester whose decreed rights are adversely affected by a State Engineer's order or decision can appeal to the decree court is inconsistent with the district court's decision in this case that the location of the applicant's water rights determines subject matter jurisdiction in this context—as, indeed, another panel of the Ninth Circuit held in *Alpine Land & Reservoir Co.*, 385 F. App'x 770, when it reversed the *Alpine* 2008 order. While the Ninth Circuit's interpretation of a Nevada statute on a matter of state law does not constitute mandatory precedent, *Custom Cabinet Factory of N.Y. v. Dist. Ct.*, 119 Nev. 51, 54, 62 P.3d 741, 742-43 (2003), *overruled on other grounds by Winston Products Co. v. DeBoer*, 122 Nev. 517, 134 P.3d 726 (2006), we nonetheless respect such authority as persuasive. *Carlton v. Manuel*, 64 Nev. 570, 584, 187 P.2d 558, 565 (1947). And more fundamentally, the 2010 *Orr Ditch* decision rests both on the Ninth Circuit's interpretation of NRS 533.450(1) and its interpretation of its own unique jurisdiction as a federal decree court. To read NRS 533.450(1) as vesting exclusive subject matter jurisdiction in the court of the county where all or part of the applicant's actual or proposed water rights lie would create conflict with the 2010 *Orr Ditch* decision and, ultimately, within NRS 533.450(1) itself, a result we reject.

C.

Our holding that NRS 533.450(1) does not limit subject matter jurisdiction according to the location of an applicant's water rights is not inconsistent with *Jahn v. District Court*, 58 Nev. 204, 73 P.2d 499 (1937), although several respondents argue otherwise. *Jahn* grew out of the long-running and contentious litigation by Humboldt Lovelock Irrigation, Light & Power Company (HLILP), which established the Pitt-Taylor Reservoirs, on the one hand, and the State Engineer and the United States, on the other, over the establishment of the Rye Patch Reservoir. *See United States v. Humboldt Lovelock Irr. Light & P. Co.*, 97 F.2d 38, 39-42 (9th Cir. 1938); Gray Mashburn & W. T. Mathews, *The Humboldt River Adjudication*, at v-vii (1943); *see also Carpenter v. District Court*, 59 Nev. 42, 73 P.2d 1310 (1937) (prohibiting the Humboldt County district court from granting new trials in favor of noncontest claimants seeking to reopen the decree adjudicating rights to Humboldt River waters), *aff'd on reh'g*, 59 Nev. 48, 84 P.2d 489 (1938).

The issue that divided the parties in *Jahn* was whether HLILP could proceed under section 36½ of the water law (now NRS 533.220(1)) with a request that the decree court direct the State Engineer to act as HLILP demanded or was limited to, and should have initiated, a proceeding for review under section 75 (now NRS 533.450(1)). *Jahn*, 58 Nev. at 206-08 (reprinting the parties' arguments); *id.* at 211-12, 73 P.2d at 501-02. The court held that the remedy afforded by section 75 was exclusive, and that HLILP could not proceed under section 36½ or pursuant to the inherent powers of the decree court, which was located in Humboldt County. *Jahn*, 58 Nev. at 213, 73 P.2d at 502 (''As the water law . . . does not contemplate such a procedure in the district court as was initiated by the company [HLILP], the law does not confer the right of appeal from the order in question.'').

The *Jahn* opinion could have begun and ended there, since HLILP had proceeded under section 36½, not section 75. The court offered the following additional observation, however, on which several respondents rely here:

> In pursuing the remedy provided for in section 75 of the water law (N.C.L., sec. 7961), it is required that the proceeding for the remedy be initiated in the proper court of the county in which the matters affected, or a portion thereof, are situated. Such matters in this case being situated in Pershing county, the district court in and for the county of Humboldt is without jurisdiction to entertain the proceeding.

Id. This statement is dictum but does not assist respondents in any event, as both HLILP's Pitt-Taylor Reservoirs and the Rye Patch

Reservoir are located in Pershing County, not Humboldt County. *See id*. Thus, the statement quoted above from *Jahn* does not support the applicant-based jurisdictional rule for which respondents contend.[7]

D.

[Headnote 10]

We share the Ninth Circuit's solicitude for the ''general principle of water law that a single court should have exclusive jurisdiction over an interrelated system of water rights,'' and its concern with the ''practical difficulties'' in vesting jurisdiction in more than one court. *Orr Ditch*, 600 F.3d at 1160. ''But th[e former] principle, while valid and important, is not an inviolable rule,'' *id.*, and the practical difficulties can be alleviated in significant part by recognizing that the general forum clause in NRS 533.450(1) addresses venue, rather than subject matter jurisdiction. *Compare* NRS 13.050 (providing for change of venue in proceedings not brought in ''the proper county'') *with* NRS 533.165 (analogously recognizing and providing a ''procedure when [an unadjudicated] stream system [is located] in two or more judicial districts,'' which is that the judges of the different courts shall decide which will be the decree court). Such an approach is consistent with the language in NRS 533.450(1)'s forum clause (the ''proper court of the county'' where ''the matters affected or a portion thereof are situated''), which speaks the language of venue, *see* NRS 13.010(2) (addressing venue in terms of ''the county in which the subject of the action, or some part thereof, is situated''); NRS 13.050 (''[i]f the county designated . . . be not the proper county,'' venue may be changed), rather than that of subject matter jurisdiction. *Landreth v. Malik*, 127 Nev. 175, 180-81, 251 P.3d 163, 168-69 (2011) (holding that Nev. Const. art. 6, § 6(1) vests general jurisdiction in all district court judges equally and rejecting the argument that the Legislature can create family courts as district courts of limited, not general, jurisdiction). It also comports with the position taken by the State Engineer, who took a venue-based approach in the district court, where he moved to change venue—not to dismiss—a position to which he returned in his supplemental

[7]To the extent this statement in *Jahn* may be read to hold that the decree court lacks jurisdiction under section 75 to entertain appeals from decisions affecting decreed rights—a point neither side argued in *Jahn*—its holding was abrogated by the 1951 amendments that added the final clause of exception to NRS 533.450(1). 1951 Nev. Stat., ch. 110, § 11, at 140. *See also Orr Ditch*, 600 F.3d at 1160 (construing the clause of exception in NRS 533.450(1) as conferring jurisdiction on a decree court to hear appeals from decisions or orders to the extent of their effect on decreed rights).

brief to this court.[8] *See State v. State Engineer*, 104 Nev. at 713, 766 P.2d at 266 (''While not controlling, [the State Engineer's] interpretation of a [water law] statute is persuasive.'').

We recognize that the general venue statutes refer to changing ''the place of *trial*,'' NRS 13.010; NRS 13.040; NRS 13.050; *but see* NRS 13.030 (addressing venue in actions involving counties in terms of place the action was commenced), while review under NRS 533.450(1) is ''in the nature of an *appeal*.'' However, this does not defeat their application in this context. *See* NRS 533.450(8) (''The practice in civil cases applies to the informal and summary character of such proceedings, as provided in this section.''). The general venue statutes apply to proceedings at the time they are initiated, not just to the eventual trial. Thus, a change of venue must be demanded ''before the time for answering expires,'' NRS 13.050(1), and ''[w]hen the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed . . . .'' NRS 13.050(3). This court has long drawn on procedures and law applicable to civil actions generally in water law cases, to the extent consistent with the governing statutes, *see Carpenter v. District Court*, 59 Nev. 48, 53, 84 P.2d 489, 491 (1938), *aff'g on reh'g Carpenter v. District Court*, 59 Nev. 42, 73 P.2d 1310 (1937). While the lack of a full record or a decision as to venue by the district court prevents this court from deciding venue in this opinion, on remand, the district court may, in deciding the motions to change venue that remain, draw on NRS Chapter 13 to the extent appropriate.

III.

In vacating the district court's jurisdictional dismissal and remanding for a determination of venue, we do not address standing or comity and do not decide the merits of Churchill County's and the Tribe's claims that Ruling 5823 affects cognizable interests of theirs. We hold simply that the district court erred in dismissing these appeals for want of subject matter jurisdiction on the basis that the location of the applicants' water rights controls.

CHERRY, C.J., and GIBBONS, DOUGLAS, HARDESTY, SAITTA, and PARRAGUIRRE, JJ., concur.

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[8]In his supplemental brief, the State Engineer asserts that ''the question before this Court [is] proper venue'' and that, as the ''ultimate question of what the nature or extent of the relative rights [of the protesters] are under Nevada law'' remains unresolved, this court should be ''circumscribed in its language in ruling on the venue question.''

TRACY WINN, AS NATURAL PARENT AND GUARDIAN FOR THE MINOR SEDONA WINN, APPELLANT, *v.* SUNRISE HOSPITAL AND MEDICAL CENTER; MICHAEL CICCOLO, M.D.; CLINICAL TECHNICIAN ASSOCIATES, LLC; ROBERT TWELLS, CCP; AND LEE P. STEFFEN, CCP, RESPONDENTS.

No. 54251

May 31, 2012 277 P.3d 458

Appeal from a district court summary judgment in a medical malpractice action. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

Patient's father filed suit for medical malpractice against hospital, heart surgeon, and perfusionists after patient suffered extensive brain injury during heart surgery. The district court entered summary judgment in defendants' favor on limitations grounds, and father appealed. The supreme court, PARRAGUIRRE, J., held that: (1) whether father discovered facts placing him on inquiry notice of potential claims for malpractice when he was informed that patient had suffered extensive brain injury during heart surgery was question of fact, for limitations purposes; (2) father discovered facts placing him on inquiry notice of claim, for limitations purposes, when he received complete set of medical records; (3) fact issue remained whether hospital intentionally withheld material information from father; (4) fact issue remained whether hospital's failure to provide complete set of records would have hindered reasonably diligent father from pursuing claim for medical malpractice; and (5) any entitlement to tolling of one-year discovery period due to alleged concealment by hospital of records did not extend to claims against heart surgeon and perfusionists who were not involved in alleged concealment.

Affirmed in part, vacated in part, and remanded with instructions.

Richard Harris Law Firm and *Kerry L. Earley*, Las Vegas, for Appellant.

Alverson Taylor Mortensen & Sanders and *Shirley Blazich, David J. Mortensen, LeAnn Sanders*, and *Laura S. Lucero*, Las Vegas, for Respondents Michael Ciccolo, M.D.; Clinical Technician Associates, LLC; Robert Twells, CCP; and Lee P. Steffen, CCP.

Hall Prangle & Schoonveld, LLC, and *Kenneth M. Webster* and *Jonquil L. Urdaz*, Las Vegas, for Respondent Sunrise Hospital and Medical Center.

1. LIMITATION OF ACTIONS.
   The accrual date of a cause of action for medical malpractice, for purposes of the one-year limitations period governing a claim upon discovery of the injury, ordinarily presents a question of fact to be decided by the jury, and only when evidence irrefutably demonstrates this accrual date may a district court make such a determination as a matter of law. NRS 41A.097(2).
2. APPEAL AND ERROR.
   When the district court considers evidence outside of the pleadings in granting a motion to dismiss, the supreme court treats the dismissal order as an order granting summary judgment.
3. APPEAL AND ERROR.
   The supreme court reviews an appeal from an order granting summary judgment de novo.
4. LIMITATION OF ACTIONS.
   Whether patient's father discovered facts to place him on inquiry notice of potential negligence of surgeons and perfusionists when father was informed that patient had suffered extensive brain injury during heart surgery was question of fact, for purposes of one-year limitations period governing medical malpractice claim. NRS 41A.097(2).
5. LIMITATION OF ACTIONS.
   Patient's father discovered facts placing him on inquiry notice that patient's extensive brain injury may have been caused by negligence of surgeon and perfusionists during heart surgery, thus triggering one-year limitations period governing claim for medical malpractice, when father received medical records from hospital and post-operative report that referenced air being present in patient's heart at inappropriate times during surgery. NRS 41A.097(2).
6. LIMITATION OF ACTIONS.
   A plaintiff seeking to toll the one-year discovery period governing a claim of medical malpractice on the basis that the medical defendants concealed material information that would have placed the plaintiff on inquiry notice of the cause of action must establish that he or she acted with ''reasonable diligence'' in discovering the alleged negligence. NRS 41A.097(2), (3).
7. LIMITATION OF ACTIONS.
   Regardless of a plaintiff's subjective concern regarding the significance of withheld information, the plaintiff seeking to toll the one-year discovery period governing a claim of medical malpractice must show that the information withheld by the medical defendant would have objectively hindered a reasonably diligent plaintiff from timely filing suit; in other words, the plaintiff must show that the withheld information was material to the claim. NRS 41A.097(2), (3).
8. LIMITATION OF ACTIONS.
   A plaintiff seeking to toll the one-year discovery period governing a claim of medical malpractice on the ground that the medical defendant concealed material facts must satisfy the following two-prong test: (1) that the defendant intentionally withheld information, and (2) that this withholding would have hindered a reasonably diligent plaintiff from procuring an expert affidavit. NRS 41A.097(2), (3).
9. JUDGMENT.
   Genuine issue of material fact remained as to whether hospital intentionally withheld information from patient's father when it failed to provide father with complete set of medical records, thus precluding summary judgment on claim that one-year discovery period governing claim

for medical malpractice was tolled due to hospital's alleged concealment of material information that would have placed father on inquiry notice of cause of action. NRS 41A.097(2), (3).

10. JUDGMENT.
Genuine issue of material fact remained as to whether hospital's failure to provide patient's father with complete set of records of heart surgery, during which patient suffered extensive brain injury, would have hindered reasonably diligent father from pursuing claim for medical malpractice, thus precluding summary judgment on father's claim that one-year discovery period governing medical malpractice claim was tolled due to hospital's concealment of information. NRS 41A.097(2), (3).

11. LIMITATION OF ACTIONS.
Any entitlement to tolling of one-year discovery period governing claim of medical malpractice, due to alleged concealment by hospital of complete set of records of heart surgery during which patient suffered extensive brain injury, did not extend to claims against heart surgeon and perfusionists who were not involved in alleged concealment. NRS 41A.097(2), (3).

12. LIMITATION OF ACTIONS.
Limitation periods are meant to provide a concrete time frame within which a plaintiff must file a lawsuit and after which a defendant is afforded a level of security.

13. LIMITATION OF ACTIONS.
A tolling-for-concealment provision included within a generally applicable statute of limitations is an exception to the general rule, meant merely to prevent a defendant from taking affirmative action to prevent the plaintiff from bringing suit.

14. LIMITATION OF ACTIONS.
A defendant who has done nothing to delay a plaintiff's lawsuit should not be punished by tolling an applicable statute of limitations solely on the basis of an unrelated third party's conduct.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

Nevada's statute of limitations governing medical malpractice actions is NRS 41A.097. Subsection 2 of that statute provides that such actions must be filed within three years of the injury date and within one year of the injury's discovery. Both deadlines are tolled under subsection 3, however, when the health care provider has concealed information upon which the action is based.

In this appeal, we consider three issues regarding NRS 41A.097 subsections 2 and 3. First, we consider the circumstances in which a district court may appropriately determine, as a matter of law, the accrual date for subsection 2's one-year discovery period. Second, we consider the meaning of the term ''concealed'' in subsection 3 and examine what a plaintiff must establish in order to warrant a tolling of subsection 2's limitation periods. Finally, we consider

whether one defendant's alleged concealment of records can be imputed to other defendants for purposes of tolling subsection 2's limitation periods as to those defendants.

Because questions of fact remain as to whether subsection 2's one-year discovery period was tolled for concealment against respondent Sunrise Hospital and Medical Center, we vacate the district court's summary judgment in this regard and remand for further proceedings. However, because subsection 3's tolling-for-concealment provision does not apply against respondents Michael Ciccolo, M.D.; Clinical Technician Associates, LLC; Robert Twells, CCP; and Lee P. Steffen, CCP, we affirm the district court's summary judgment in their favor.

FACTS AND PROCEDURAL HISTORY

On December 14, 2006, 13-year-old Sedona Winn underwent heart surgery at respondent Sunrise Hospital and Medical Center. Respondent Michael Ciccolo, M.D., was the operating physician who performed the surgery, and respondents Robert Twells, CCP, and Lee Steffen, CCP, were the perfusionists who acted as the pump team to maintain Sedona's blood flow during surgery (collectively, the doctors).

On the day after her surgery, Sedona's father, Robert Winn, was informed that she had suffered an ''extensive brain injury'' during the surgery. The brain injury rendered Sedona comatose and has led to permanent neurological impairment. In conveying this news to Winn, the doctors were unable to provide an explanation for how this tragic result arose from what was considered to be a relatively minor surgery.

By January 2007, Winn, acting as guardian ad litem for Sedona, had retained an attorney to represent him in a medical malpractice action against Sunrise and the doctors.[1] In mid-January, Winn's counsel sent a letter to Sunrise requesting that Sunrise produce ''all patient records'' relating to Sedona's surgery. Three days later, Winn's attorney sent Sunrise a second records request, this time for records pertinent to filing a claim for Social Security Disability benefits.

On February 14, 2007, in connection with the Social Security-related request, Sunrise provided Winn's attorney with a copy of 182 pages of records, which included Dr. Ciccolo's December 14, 2006, postoperative report. According to an affidavit Winn's med-

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[1]Winn would also bring suit against Clinical Technician Associates, LLC, the employer of two of the doctors. This opinion's references to ''the doctors'' include Clinical Technician Associates, LLC.

We also note that Sedona's mother, Tracy Winn, was substituted as Sedona's guardian ad litem during the pendency of this appeal. Because Sedona's father served as her guardian in district court, we refer to Mr. Winn in this opinion.

ical expert would later produce, Dr. Ciccolo's report indicated that a ''notable volume of air'' was present in Sedona's left ventricle at ''inappropriate times during the [surgical] procedure.''

These 182 pages of records were sufficient for Winn's attorney to successfully pursue Sedona's Social Security claim. However, due to several delays, the reasons for which are still in dispute, Sunrise did not provide Winn's attorney with any additional records until December 2007. Even at this point, the records provided were only a ''nearly complete'' set. Not until February 12, 2008, did Sunrise finally provide Winn's attorney with a complete set of Sedona's records, which included a post-surgery MRI and CT scan.

Having obtained Sedona's complete set of records, Winn's attorney procured an expert affidavit in which a medical expert opined that Sunrise and the doctors had negligently caused Sedona's injuries.[2] In formulating his opinions, Winn's expert relied primarily on Dr. Ciccolo's postoperative report that Winn received from Sunrise on February 14, 2007. After obtaining the expert affidavit, Winn filed suit against Sunrise and the doctors on February 3, 2009.

Each of the respondents moved to dismiss Winn's complaint on the basis that it was barred by NRS 41A.097(2). Each respondent contended that because more than one year had elapsed between the time when Winn ''discovered'' Sedona's injury and the time when he filed suit, his claims were time-barred. Concluding that Winn had discovered Sedona's injury on December 15, 2006—the day following her surgery—the district court granted respondents' motions. This appeal followed.

DISCUSSION

Before considering Winn's arguments on appeal, we first explain NRS 41A.097's general framework. In relevant part, NRS 41A.097 provides:

> 2. Except as otherwise provided in subsection 3, an action for injury or death against a provider of health care may not be commenced more than *3 years after the date of injury* or *1 year after the plaintiff discovers* or through the use of *reasonable diligence* should have discovered the injury, *whichever occurs first* . . . .

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[2]Subject to exceptions not applicable here, NRS 41A.071 requires a district court to dismiss a medical malpractice complaint unless an expert affidavit is filed with the complaint. The affidavit must ''support[ ] the allegations'' contained in the complaint and must be ''submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice.'' NRS 41A.071.

The record on appeal indicates that Winn procured two expert affidavits. For the sake of clarity, this opinion refers to these affidavits in the singular.

> 3. This time limitation is tolled for any period during which the provider of health care has *concealed* any act, error or omission upon which the action is based and which is known or through the use of reasonable diligence should have been known to the provider of health care.

(Emphases added.)

All parties to this appeal agree that Sedona's injury occurred no later than December 15, 2006, the day after her surgery when she was rendered comatose. The parties also correctly agree that subsection 2, by its terms, requires Winn to satisfy both the one-year discovery period *and* the three-year injury period.

The parties disagree, however, regarding three issues.[3] First, the parties disagree as to when Winn ''discovered'' Sedona's injury for purposes of triggering subsection 2's one-year discovery period. Second, Winn and Sunrise dispute the meaning of subsection 3's use of the term ''concealed'' as it relates to Sunrise's piecemeal production of records and Winn's resulting delay in filing suit. Finally, Winn and the doctors disagree as to whether Sunrise's alleged concealment of records can serve as a basis for tolling the one-year discovery period on Winn's claims against the doctors who played no role in the alleged concealment.

[Headnote 1]

As explained below, the accrual date for subsection 2's one-year discovery period ordinarily presents a question of fact to be decided by the jury. Only when evidence irrefutably demonstrates this accrual date may a district court make such a determination as a matter of law. Although the evidence in this case does irrefutably demonstrate the accrual date, this date was two months later than the date identified by the district court. We conclude that this difference in timing, combined with our analysis below, may render Winn's claim against Sunrise timely if tolling principles apply.

We next conclude that a plaintiff must satisfy a two-prong test in order to establish that subsection 2's limitation periods should be tolled for concealment. Because factual issues remain as to whether Sunrise (1) intentionally withheld information that (2) was ''material,'' meaning the information would have hindered a reasonably diligent plaintiff from timely filing suit, we vacate the district court's summary judgment in favor of Sunrise and remand so that Winn can be afforded the opportunity to make these showings.

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[3]Winn also argues that NRS 41A.097's lack of a minority tolling provision renders the statute unconstitutional. Because he did not raise this argument in district court, we decline to address it on appeal. *See Munoz v. State ex rel. Dep't of Hwys.*, 92 Nev. 441, 444, 552 P.2d 42, 43-44 (1976) (refusing to consider a constitutional challenge that was not first raised in district court).

We further conclude, however, that one defendant's concealment cannot serve as a basis for tolling subsection 2's limitation periods as to defendants who played no role in the concealment. This conclusion, combined with the date when the one-year discovery period irrefutably accrued, renders Winn's claims against the doctors time-barred. We therefore affirm the district court's summary judgment in favor of the doctors.

Standard of review

[Headnote 2]

Because the district court considered evidence outside of the pleadings in granting respondents' motions to dismiss, we treat each dismissal order as an order granting summary judgment. *Witherow v. State, Bd. of Parole Comm'rs*, 123 Nev. 305, 308, 167 P.3d 408, 409 (2007).

[Headnote 3]

We review an appeal from an order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate ''when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.' '' *Id.* (alteration in original) (quoting NRCP 56(c)). When deciding a motion for summary judgment, ''the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.'' *Id.*

NRS 41A.097(2)'s discovery date may be determined as a matter of law only when the evidence irrefutably demonstrates that a plaintiff has been put on inquiry notice

Winn filed suit against all respondents on February 3, 2009. Thus, absent any tolling of subsection 2's one-year discovery period, Winn would have had to discover Sedona's injury no earlier than February 3, 2008.

In *Massey v. Litton*, 99 Nev. 723, 669 P.2d 248 (1983), this court held that a plaintiff ''discovers'' his injury ''when he knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on *inquiry notice* of his cause of action.'' 99 Nev. at 728, 669 P.2d at 252 (emphasis added). While difficult to define in concrete terms, a person is put on ''inquiry notice'' when he or she should have known of facts that ''would lead an ordinarily prudent person to investigate the matter further.'' *Black's Law Dictionary* 1165 (9th ed. 2009). We reiterated in *Massey* that these facts need not pertain to precise legal theories the plaintiff may ultimately pursue, but merely to the

plaintiff's general belief that someone's negligence may have caused his or her injury. 99 Nev. at 728, 669 P.2d at 252. Thus, Winn ''discovered'' Sedona's injury at a point when he had facts before him that would have led an ordinarily prudent person to investigate further into whether Sedona's injury may have been caused by someone's negligence.

[Headnote 4]

In granting respondents' summary judgment motions, the district court concluded as a matter of law that Winn discovered Sedona's injury on December 15, 2006, the day following her surgery, when respondents were unable to provide an explanation for the surgery's catastrophic result. We believe this was improper, as ''[t]he appropriate accrual date for the statute of limitations is a question of law only if the facts are uncontroverted.'' *Day v. Zubel*, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996); *see also Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998) (''Dismissal on statute of limitations grounds is only appropriate 'when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered' the facts giving rise to the cause of action.'' (quoting *Nevada Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1307 (9th Cir. 1992))).

Here, the record is unclear as to what respondents specifically conveyed to Winn in the wake of Sedona's surgery, and respondents' failure to provide Winn with an explanation is not, in and of itself, a tacit acknowledgment of negligence. Similarly, it is unlikely that an ordinarily prudent person would begin investigating whether a cause of action might exist on the same day as being informed that his or her child's surgery had gone drastically wrong. Accordingly, the evidence does not ''irrefutably demonstrate[ ]'' that Winn discovered Sedona's injury on December 15, 2006. *Bemis*, 114 Nev. at 1025, 967 P.2d at 440 (internal quotation omitted). The district court therefore erred in determining as a matter of law that subsection 2's one-year discovery period accrued on December 15, 2006.

[Headnote 5]

However, the evidence does irrefutably demonstrate that Winn discovered Sedona's injury no later than February 14, 2007—the date when he received the initial 182 pages of medical records. At this point, Winn had not only hired an attorney to pursue a medical malpractice action, but he also had access to Dr. Ciccolo's postoperative report that referenced air being present in Sedona's heart at inappropriate times during the surgery. By this point at the latest, Winn and his attorney had access to facts that would have led an ordinarily prudent person to investigate further into whether Sedona's injury may have been caused by someone's negligence. *Massey*, 99 Nev. at 728, 669 P.2d at 252. Thus, as a matter of law,

the evidence irrefutably demonstrates that Winn was put on inquiry notice of his potential cause of action no later than February 14, 2007. *Bemis*, 114 Nev. at 1025, 967 P.2d at 440.

Factual issues remain as to whether subsection 2's one-year discovery period should have been tolled due to Sunrise's alleged concealment of records

Winn argues alternatively that his February 3, 2009, lawsuit is timely as to all respondents because subsection 2's one-year discovery period should have been tolled for concealment pursuant to subsection 3 until February 12, 2008. This is the date when Sunrise ultimately provided Winn with a complete set of records, which, according to Winn, was necessary to procure an expert affidavit.[4]

In response, Sunrise acknowledges that Winn did not receive a complete set of records until February 12, 2008. Nonetheless, Sunrise vigorously objects to the notion that it ''concealed'' these records from him, which is what subsection 3 requires for tolling. Viewing the facts in the light most favorable to Winn, *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005), we conclude that factual issues remain as to whether the one-year discovery period should have been tolled.

Resolution of this issue requires us to consider the interplay between subsection 3's tolling provision and subsection 2's standard of ''reasonable diligence.'' We begin by considering subsection 3's tolling provision, which provides that ''[subsection 2's] time limitation is tolled for any period during which the provider of health care has *concealed* any act, error or omission upon which the action is based.'' NRS 41A.097(3) (emphasis added).

Subsection 3's use of the term ''concealed'' carries with it a specific connotation. While different legal authorities define concealment in slightly varying ways, these definitions generally in-

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[4]We recognize that some jurisdictions with similar statutes of limitation refuse to toll their respective discovery periods. *See, e.g.*, *Sanchez v. South Hoover Hospital*, 553 P.2d 1129, 1134 (Cal. 1976) (''Notwithstanding a defendant's continuing efforts to conceal, if plaintiff discovers the claim independently, the limitations period commences.''); *Shockley v. Dyer*, 456 A.2d 798, 799 (Del. 1983) (''Where there has been fraudulent concealment from a plaintiff, the statute is suspended only until his rights are discovered or until they could have been discovered by the exercise of reasonable diligence.'').

We decline to follow this approach, as subsection 3's plain language makes clear that the tolling-for-concealment exception applies to subsection 2 as a whole—not just to the outer three-year injury period. *See Karcher Firestopping v. Meadow Valley Contr.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009) (''If a statute's language is clear and unambiguous, this court will apply its plain language.''). Considering NRS 41A.071's expert affidavit requirement, this is logical. Otherwise, a defendant could simply stonewall a plaintiff's request for medical records for one year and thereby be immune from suit.

clude two specific elements: (1) an intentional act by one party that (2) prevents or hinders another party from learning something. *See, e.g.*, *Black's Law Dictionary* 327 (9th ed. 2009) (defining concealment as ''*an act* by which one *prevents or hinders*'' another party from realizing something (emphases added)); Restatement (Second) of Contracts § 160 (1981) (defining concealment as ''an *affirmative act intended* or known to be likely to *keep another* from learning of a fact'' (emphases added)). Thus, by using the term ''concealed'' in subsection 3, it is evident that the Legislature intended for subsection 3's tolling provision to apply only in situations when these two elements are present. *State v. State, Employees Assoc.*, 102 Nev. 287, 289, 720 P.2d 697, 699 (1986) (''When a statute uses words which have a definite and plain meaning, the words will retain that meaning unless it clearly appears that such meaning was not so intended.'').

[Headnotes 6, 7]

In addition to establishing that a defendant ''concealed'' information under subsection 3, a plaintiff seeking to toll subsection 2's one-year discovery period must also establish that he or she satisfied subsection 2's standard of ''reasonable diligence.''[5] Thus, regardless of a plaintiff's subjective concern regarding the significance of withheld information, the plaintiff must show that this information would have objectively hindered a reasonably diligent plaintiff from timely filing suit. In other words, the plaintiff must show that the withheld information was ''material.'' *Cf. Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988) (equating ''materiality'' of undisclosed information with the significance that a ''reasonable investor'' would ascribe to the information); Restatement (Second) of Torts § 538(2)(a) (1977) (indicating that a matter is ''material'' if ''a reasonable man would attach importance to its existence or nonexistence in determining his choice of action'').

[Headnote 8]

Accordingly, when subsection 3 and subsection 2 are read in tandem, Winn must satisfy the following two-prong test in order to establish that subsection 2's one-year discovery period should be tolled: (1) that Sunrise intentionally withheld information, and (2) that this withholding would have hindered a reasonably diligent plaintiff from procuring an expert affidavit.

[Headnote 9]

As to whether Sunrise intentionally withheld information, the record on appeal provides us with no clear guidance. Winn evi-

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[5]Given subsection 3's applicability to both of subsection 2's limitation periods, this interpretation is proper. *Karcher*, 125 Nev. at 113, 204 P.3d at 1263 (''The goal of statutory interpretation is to effectuate the Legislature's intent.'').

dently canceled and reinstated the same records request on numerous occasions, which may have left Sunrise without clear direction as to whether it should provide the roughly 3,000 additional pages of records in addition to the 182 pages it had already provided Winn in February 2007. Although the district court's summary judgment order did conclude that subsection 3's tolling provision was inapplicable, it provided no factual findings to support this conclusion—for example, when Winn had a pending request, and what Sunrise's response was to this request. Thus, factual issues remain as to when Sunrise was presented with an unequivocal request for medical records and whether Sunrise, upon receiving this request, intentionally withheld the requested records.

[Headnote 10]

As to whether such withholding would have hindered a reasonably diligent plaintiff from procuring an expert affidavit, Sunrise and Winn are in disagreement. Sunrise indicates that even once Winn procured his expert affidavit, the expert relied largely upon Dr. Ciccolo's postoperative report, a document that was among the initial 182 pages of records that Sunrise provided in February 2007. Thus, Sunrise contends, even if the delay in providing a complete set of records may have hindered Winn from filing suit, the delay would not have hindered a reasonably diligent plaintiff from doing the same.

Winn, on the other hand, indicates that these initial 182 pages did not contain records such as Sedona's post-surgery MRI and CT scans—records that Winn contends were critical for his expert's review of the case. In other words, Winn contends that even though his expert may not have expressly referenced these particular records in his affidavit, it was nonetheless imperative that his expert review them before opining under oath that respondents were negligent.

At its core, the parties' disagreement comes down to a question of materiality. Although Winn's expert may ultimately have *referenced* the postoperative report in his affidavit, the record on appeal is silent as to whether other records were material to conducting a full *review* of Sedona's case. *See Levinson*, 485 U.S. at 240; Restatement (Second) of Torts § 538(2)(a) (1977). Thus, based upon the facts before us, we are unable to affirm the district court's summary judgment in favor of Sunrise, and we therefore vacate that order.

On remand, Winn is to be afforded an opportunity to show that subsection 2's one-year discovery period should have been tolled as to his claim against Sunrise. Winn must satisfy a two-prong test: (1) that Sunrise intentionally withheld records after being pre-

sented with an unequivocal request for them, and (2) that this intentional withholding would have hindered a reasonably diligent plaintiff from procuring an expert affidavit.

One defendant's concealment cannot toll the statute of limitations as to a second defendant who played no role in the concealment

[Headnote 11]

Again relying on subsection 3's tolling-for-concealment language, Winn contends that Sunrise's alleged concealment serves to toll subsection 2's one-year discovery period as to all respondents in this case—Sunrise and the doctors alike. The doctors disagree. They contend that Winn's only allegation of concealment was directed toward Sunrise, the party that had access to the records in question and the only party from whom Winn requested any records. Thus, the doctors conclude, because Winn has not alleged that the doctors concealed anything from him that could plausibly warrant tolling the one-year discovery period as to them, his claims against them are time-barred.

We agree with the doctors. Subsection 3's plain language states that subsection 2's limitation periods are tolled ''for any period during which *the* provider of health care has concealed any act, error or omission upon which the action is based.'' NRS 41A.097(3) (emphasis added). By using this defendant-specific language, it is apparent that the Legislature meant for subsection 3 to toll subsection 2's limitation periods only with respect to the defendant responsible for the concealment. *See Sheriff v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008) (''[W]e only look beyond the plain language of the statute if that language is ambiguous or its plain meaning clearly was not intended.'').

[Headnote 12]

This conclusion is reinforced by the public-policy considerations that form the basis for any statute of limitations. Namely, such limitation periods are meant to provide a concrete time frame within which a plaintiff must file a lawsuit and after which a defendant is afforded a level of security. *See Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 19 (1990) (''[S]tatutes of limitation embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs.'' (internal quotation omitted)).

[Headnote 13]

In this regard, a tolling-for-concealment provision included within a generally applicable statute of limitations is an exception to the general rule, meant merely to prevent a defendant from taking affirmative action to prevent the plaintiff from bringing

suit. *Brown v. Bleiberg*, 651 P.2d 815, 821 (Cal. 1982) (''[T]he rationale of the tolling doctrine is estoppel.''); *Smith v. Boyett*, 908 P.2d 508, 512 (Colo. 1995) (''The knowing concealment exception . . . embodies the common law concept that a wrongdoer should not be able to take advantage of his own wrong.'').

[Headnote 14]

Thus, within this public-policy framework, a defendant who has done nothing to delay a plaintiff's lawsuit should not be punished solely on the basis of an unrelated third party's conduct. *See Jensen v. IHC Hospitals, Inc.*, 82 P.3d 1076, 1083 (Utah 2003) (''[T]he alleged fraud of one defendant generally cannot be imputed to another defendant for tolling purposes when the other defendant did not participate in the alleged fraud.'' (footnote omitted)); *see also Brown*, 651 P.2d at 821 (declining to toll a medical malpractice statute of limitations as to one defendant when the only alleged concealment was by a different defendant).

In this case, Winn's only allegation of concealment was directed toward Sunrise, as he never requested any records from the doctors. He therefore cannot rely on subsection 3 as a basis for tolling subsection 2's one-year discovery period as to the doctors. Because he discovered Sedona's injury no later than February 14, 2007, and because he filed suit against the doctors on February 3, 2009, Winn's claims against the doctors are time-barred by subsection 2's one-year discovery period. We therefore affirm the district court's summary judgment in favor of respondents Michael Ciccolo, M.D.; Clinical Technician Associates, LLC; Robert Twells, CCP; and Lee P. Steffen, CCP.

CONCLUSION

We conclude that the accrual date for NRS 41A.097(2)'s one-year discovery period ordinarily presents a question of fact to be decided by the jury. Only when the evidence irrefutably demonstrates that a plaintiff was put on inquiry notice of a cause of action should the district court determine this discovery date as a matter of law. Although we agree with the district court that the evidence in this case irrefutably demonstrates that Winn was put on inquiry notice, we disagree as to when this occurred. This difference in timing, combined with our analysis of NRS 41A.097(3)'s tolling-for-concealment provision, precludes affirming the district court's summary judgment in favor of Sunrise.

With regard to Winn's tolling-for-concealment argument, we conclude that factual issues remain as to whether Sunrise concealed records from Winn so as to warrant tolling NRS 41A.097(2)'s one-year discovery period. We therefore vacate the district court's summary judgment in favor of Sunrise and remand this case so that Winn may be afforded an opportunity to show that

Sunrise intentionally withheld records that would have hindered a reasonably diligent plaintiff from procuring an expert affidavit.

We further conclude, however, that one defendant's concealment cannot serve as a basis for tolling NRS 41A.097(2)'s statutory limitation periods as to defendants who played no role in the concealment. This conclusion, combined with the date when Winn was irrefutably put on inquiry notice, renders Winn's claims against the doctors time-barred. We therefore affirm the district court's summary judgment in favor of the doctors.

CHERRY, C.J., and DOUGLAS, SAITTA, GIBBONS, PICKERING, and HARDESTY, JJ., concur.

JONATHON WHITEHEAD, AKA JONATHAN WHITEHEAD, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 55865

May 31, 2012 285 P.3d 1053

Petition for en banc reconsideration of an appeal from an order dismissing a post-conviction petition for writ of habeas corpus. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Defendant, who pleaded guilty to driving under the influence (DUI) causing death and DUI causing substantial bodily harm, filed a post-conviction petition for writ of habeas corpus. The district court dismissed the petition as untimely, and appeal was taken. A panel of the supreme court affirmed. Defendant filed a petition for rehearing, which the panel denied, and defendant subsequently petitioned for en banc reconsideration. The supreme court, HARDESTY, J., held that: (1) judgment of conviction that imposes a restitution obligation, but does not specify its terms, is not a final judgment, and in these circumstances, the intermediate judgment is not sufficient to trigger the one-year statutory period for filing a post-conviction petition for a writ of habeas corpus, and (2) although the district court determined that restitution was appropriate in its May order, no final judgment was entered until the court's subsequent January order when the court set forth a specific dollar amount of restitution.

Reconsideration granted; reversed and remanded.

Mario D. Valencia, Henderson, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Brian T. Kunzi*, District Attorney, and *Kirk Darren Vitto*, Deputy District Attorney, Nye County, for Respondent.

1. SENTENCING AND PUNISHMENT.
   Setting the amount of restitution after an evidentiary hearing is not analogous to correcting an error, and instead, it is an integral part of the sentence.
2. HABEAS CORPUS; SENTENCING AND PUNISHMENT.
   Given statutory requirements that restitution, if appropriate, be included in the judgment of conviction and in a specific dollar amount, a judgment of conviction that imposes a restitution obligation, but does not specify its terms, is not a final judgment, and in these circumstances, the intermediate judgment is not sufficient to trigger the one-year statutory period for filing a post-conviction petition for a writ of habeas corpus. NRS 34.726, 176.105(1).
3. HABEAS CORPUS; SENTENCING AND PUNISHMENT.
   Although the district court determined that restitution was appropriate in its initial and first amended judgments of conviction, no final judgment was entered, as to trigger the statutory one-year period for filing a petition for a writ of habeas corpus, until second amended judgment of conviction setting a specific dollar amount for restitution; initial judgment of conviction set forth sentence for each offense, credit for time served, and specific amounts of fines and assessments imposed, but stated ''[t]hat restitution shall be determined by stipulation or hearing,'' and first amended judgment of conviction included the same substantive sentencing provisions with the same reservation as to restitution. NRS 34.726, 176.105(1).

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

Petitioner Jonathon Whitehead pleaded guilty to DUI causing death and DUI causing substantial bodily harm and subsequently filed a post-conviction petition for writ of habeas corpus. A panel of this court affirmed the district court's dismissal of his petition as untimely. Whitehead filed a petition for rehearing, which the panel denied, and now Whitehead petitions for en banc reconsideration.

Whitehead contends that the panel overlooked NRS 176.105(1) and whether a judgment of conviction that imposes restitution but leaves the amount of restitution to be determined is final for purposes of triggering the one-year period under NRS 34.726 for filing a post-conviction petition for a writ of habeas corpus. Having reviewed the petition and the State's answer, we conclude that reconsideration is warranted. *See* NRAP 40A(a).

When a district court determines that restitution is appropriate, the judgment of conviction must set forth the amount and terms of restitution. NRS 176.105(1); *see also* NRS 176.033(1)(c). We conclude that a judgment of conviction that imposes restitution but does not set an amount of restitution, in violation of Nevada

statutes, is not final and therefore does not trigger the one-year time limit for filing a post-conviction petition for a writ of habeas corpus. As Whitehead's post-conviction petition is timely under this analysis, we reverse and remand for further proceedings on the merits of the petition.

FACTS AND PROCEDURAL HISTORY

On September 20, 2006, law enforcement personnel were called to an accident scene in Pahrump, Nevada, where they encountered Whitehead's vehicle overturned on the roadway. Investigators determined that Whitehead had been driving with seven friends packed into his vehicle and at a high rate of speed. At some point, Whitehead veered off the road and overcorrected, causing the vehicle to roll over several times and several occupants to be ejected onto the highway. Seventeen-year-old Brandy Fuller, who had been riding on another occupant's lap, died at the scene, and four other occupants were gravely wounded. A subsequent test of Whitehead's blood taken just after the accident showed that it contained various concentrations of alcohol, marijuana, and marijuana metabolite.

After plea negotiations with the State, Whitehead pleaded guilty to DUI causing death and DUI causing substantial bodily harm. The parties agreed that Whitehead would enter a regimental discipline program and that the State would recommend concurrent sentences. The district court accepted the plea agreement.

After Whitehead completed the regimental discipline program, the district court imposed consecutive terms of 96 to 240 months for DUI causing death and 48 to 120 months for DUI causing substantial bodily harm. The district court entered a judgment of conviction on May 7, 2008, that set forth the sentence for each offense, the credit for time served, and the specific amounts of the fines and assessments imposed but stated ''[t]hat restitution shall be determined by stipulation or hearing.'' An amended judgment of conviction filed on May 16, 2008, included the same substantive sentencing provisions but stated ''[t]hat restitution shall be determined by stipulation or hearing.'' The district court ultimately held a restitution hearing and entered a ''Second Amended Judgment of Conviction'' on January 27, 2009, stating the same sentencing terms and ordering Whitehead to pay $1,390,647 in restitution.

Whitehead did not directly appeal but filed a post-conviction petition for a writ of habeas corpus on May 13, 2009, listing May 16, 2008, as the date of his conviction. In that petition, Whitehead raised 45 claims of constitutional error, none of which related to the amount of restitution. The district court dismissed the petition, concluding that because the date of conviction was May 7,

2008, the petition was untimely and therefore barred by NRS 34.726(1).[1] On appeal from the district court's order, Whitehead argued, *inter alia*, that a judgment of conviction that imposed restitution in an unspecified amount is not final until an amount of restitution is determined and that in his case the final judgment of conviction was not entered until January 27, 2009, making his petition timely.

DISCUSSION

NRS 34.726(1) states in relevant part that ''a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction.'' Both the district court and this court determined that the judgment of conviction that this section refers to was, in Whitehead's case, the judgment of conviction filed on May 7, 2008. In support of that conclusion, this court relied on *Sullivan v. State*, 120 Nev. 537, 540, 96 P.3d 761, 764 (2004), for the proposition that tolling the one-year time limit every time the district court amended a judgment of conviction to correct an error would ''frustrate the purpose and spirit of NRS 34.726.''

[Headnote 1]

Upon reconsideration, however, we conclude that *Sullivan* is distinguishable. In that case, the judgment of conviction was amended to correct a clerical error. The court noted that NRS 176.565 permits the district court to amend a judgment of conviction to correct such an error ''years, even decades, after the entry of the original judgment of conviction.'' *Sullivan*, 120 Nev. at 540, 96 P.3d at 764. Setting the amount of restitution after an evidentiary hearing is not analogous to correcting an error; rather, it is an integral part of the sentence. To that end, NRS 176.105(1) states that ''the judgment of conviction must set forth . . . any term of imprisonment, the amount and terms of any fine, restitution or administrative assessment.'' Another provision, NRS 176.033(1)(c), requires the district court to ''set an amount of restitution'' when it determines that restitution ''is appropriate'' as part of a sentence. We have held that this statute ''contemplates that the district court will set a specific dollar amount of restitution'' and therefore ''does not allow the district court to award restitution in uncertain terms.'' *Botts v. State*, 109 Nev. 567, 569, 854 P.2d 856, 857 (1993).

[Headnote 2]

Given the requirements in NRS 176.105(1) (that restitution, if appropriate, be included in the judgment of conviction and in a

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[1]Whitehead never conceded that his post-conviction petition was untimely, and therefore never alleged that good cause existed to excuse the untimely filing. *See* NRS 34.726(1).

specific dollar amount), we conclude that a judgment of conviction that imposes a restitution obligation but does not specify its terms is not a final judgment.[2] In those circumstances, the intermediate judgment is not sufficient to trigger the one-year period under NRS 34.726 for filing a post-conviction petition for a writ of habeas corpus. To hold otherwise would lead to piecemeal post-conviction litigation, in direct conflict with NRS 34.726, which came out of legislative action whose ''overall spirit was one of limiting habeas petitioners to one time through the system absent extraordinary circumstances'' and ''evinces intolerance toward perpetual filing of petitions for relief'' as they ''clog[ ] the court system and undermine[ ] the finality of convictions,'' *Pellegrini v. State*, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001).

[Headnote 3]

Here, the district court determined that restitution was appropriate, but the May 7, 2008, and May 16, 2008, judgments left its amount and terms to be determined at a later hearing. The final judgment was not entered until January 27, 2009, when the district court filed a judgment of conviction that set forth a specific dollar amount of restitution. Whitehead filed his proper person post-conviction petition for a writ of habeas corpus on May 13, 2009, within one year after entry of the final judgment of conviction. It was therefore timely filed, NRS 34.726(1), and the district court erred in dismissing it as procedurally barred. Accordingly, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

CHERRY, C.J., and DOUGLAS, SAITTA, GIBBONS, PICKERING, and PARRAGUIRRE, JJ., concur.

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[2]We observe that if the district court concludes that no restitution is required or warranted as part of a defendant's sentence, a judgment of conviction need not address restitution to be final. Only a judgment of conviction that imposes restitution in an unspecified amount is not final under our decision today.